# ENEMIES OF THE STATE

# NOTABLE AMERICAN TRIALS

by FRANCIS X. BUSCH

PRISONERS AT THE BAR

*Trials of:* William ("Bill") Haywood
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ENEMIES OF THE STATE

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NOTABLE AMERICAN TRIALS

# ENEMIES OF THE STATE

*An Account of the Trials of*

THE MARY EUGENIA SURRATT CASE
THE TEAPOT DOME CASES
THE ALPHONSE CAPONE CASE
THE ROSENBERG CASE

*By* FRANCIS X. BUSCH



ARCO PUBLICATIONS LIMITED
LONDON *Publishers* MELBOURNE

# FOREWORD

*Enemies of the State* is the fourth volume in the series, *Notable American Trials,* which was inaugurated in February 1952 with the publication of *Prisoners at the Bar* and *Guilty or Not Guilty?* The third volume, *They Escaped the Hangman,* was published in February 1953.

Like its predecessors, *Enemies of the State* is a nontechnical but factually accurate account of four significant American trials. Although the cases reviewed in this volume are of crimes widely variant in circumstances and motivations and set against widely diverse backgrounds and environments, they are similar in that they all mirror extraordinary and significant situations which have arisen in the administration of criminal justice in the United States. Furthermore, these cases are parallel in that the criminal acts and intentions being tried in each case were *directly* harmful to the United States. In legal theory every criminal is an enemy of the state in the sense that he has violated the ordained rules of society and for that violation should be punished by death or segregation from the general community. But in the cases selected for this volume the criminally designed intent of the alleged criminals was directed against the state as a political entity.

In the Surratt case the defendants were charged with a conspiracy to murder the heads of the government. In the Fall (Teapot Dome) case the major defendant was charged with bribery and conspiracy to rob the government of its property. In the Capone case the defendant, although suspected of a variety of other crimes and widely known as "Public Enemy Number One," was charged with having defrauded the government out of revenue. In the Rosenberg case the defendants were charged with a conspiracy to weaken the security of the government by stealing and selling vital military secrets to a foreign government in time of war.

Because in each of these cases the intended victim was either the head of the state or the state itself, the trials had not only sensational publicity but also had, and still have, unique and historical importance.

My gratitude is due the clerks of courts and other public officials, the publishers of Washington, New York and Chicago newspapers, and the librarians and their assistants in public and private libraries in Washington, D. C., New York, Chicago and Montgomery, Alabama, for their courtesy and aid in making available to me the official court transcripts and other sources of information concerning the four trials. My thanks are also given to Miss Elizabeth Bragdon, of The Bobbs-Merrill Company, Inc., New York; to Honorable J. Earl Major, Chief Judge, United States Court of Appeals (Seventh Circuit); to Mr. Bernard K. Shapiro of Washington, D. C.; to Mr. Thomas D. Nash and Mr. Ralph Miller, Jr., both of Chicago, for their assistance in supplying essential information. I wish to thank also Mrs. Marian A. Hodgkinson for literary research, copying and proofreading the manuscript. To my wife I owe gratitude for her valuable suggestions, encouragement and inexhaustible patience.

FRANCIS X. BUSCH.

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The Trial of

MARY EUGENIA SURRATT

*and*

OTHERS

for the Murder of

PRESIDENT ABRAHAM LINCOLN

(May–June, 1865)

# 1

# The Mary Eugenia Surratt Case

EVEN NOW, *ninety years after it happened, the assassination of Abraham Lincoln may be called America's most deplored and deplorable crime. The nation's criminal records may be searched in vain for a murder more serious in its effects or more sensational in its circumstances. In a season of rejoicing and thanksgiving for the victorious close of the war which had threatened the continued existence of the Union the President of the United States was struck down. The scene was a public theater in the capital city where a shocked audience witnessed the crime uncomprehendingly. The victim was a man of courage, patience and wisdom who had contributed much to the preservation of the Union and who, had he lived, might have done much to reconcile the North and the South.*

*The hunt for the murderer of Abraham Lincoln was hardly less sensational and less tragic than the crime itself. The assassin, John Wilkes Booth, was stalked through Virginia's woods for twelve days and finally trapped and shot to death. Hundreds of other persons were arrested—they were suspected of complicity with Booth in a plot to murder not only the President, but also the Vice-President, the Secretary of State and the Lieutenant General of the Army.*

*Eight of these suspects were formally charged with plotting this mass murder and brought to trial. These were seven men and one woman—Mary Eugenia Surratt. Less than thirty days after the murder their trial before a military commission began.*

*At the time of their trial the excitement over the end of the Civil War and the assassination of the President was still at*

*fever heat. Almost daily secessionists and Confederate sympathizers were mobbed in the streets of Washington and other cities. In such an hysterical atmosphere it was surely the moral obligation of the authorities in charge to calm the passions of the enraged public clamoring for summary vengeance and to afford those charged with the crime a fair and impartial trial in which their constitutional rights would be respected.*

*But the man invested with authority by law—the erstwhile Vice-President who had succeeded to the Presidency—did nothing. Authority was usurped and exercised by another. Edward M. Stanton, the ambitious and ruthless Secretary of War, disregarding the protest of its illegality, appointed a military commission which insured a summary trial with no jury and with no appeal. Stanton's personal appointees collected the evidence. Some of it they manufactured. Stanton's prosecutors presented the case. Stanton himself did his utmost to control the verdict. Although he was unable to induce the nine-man military tribunal to visit the extreme penalty on all eight defendants he did succeed by devious means in bringing about the death sentence of Mrs. Surratt.*

*In the trial of Mrs. Surratt the accepted forms were observed. She was allowed counsel and permitted to offer testimony, other than that of herself, in her own defense. The trial, however, was wholly lacking in the spirit and substance which cherished American tradition regards as the essence of a truly fair and impartial trial.*

WASHINGTON, on April 14, 1865, was like a city which had suddenly been released from prolonged siege. For four years—ever since that memorable day when Fort Sumter had been fired on and the hurriedly recruited armies of the North and South had lined up for battle on either bank of the Potomac—the 100,000 inhabitants of the capital city had lived in alternate states of terror and celebration.

Consternation and near panic had gripped the populace when the disorganized and retreating Federals poured into the city with news of the humiliating defeat at near-by Manassas. There was a short-lived relief when, after a second debacle at Manassas, the northern sweep of Lee's advancing legions was checked at Antietam. The dismay which followed the smashing Confederate victories at Fredericksburg and Chancellorsville was replaced by reassurance and hope of ultimate victory when Meade held the enemy at Gettysburg and the long files in gray moved southward. But afterward came the Wilderness, Spottsylvania, the Bloody Angle and Cold Harbor. Renewed misgivings and mounting apprehension gripped the city as news of the seemingly endless resistance of the Confederates filtered through and as the casualty lists of Union dead and wounded grew ever longer.

And then, on April 9, 1865, came news of Lee's surrender at Appomattox. The pent-up emotions of four years broke forth in a saturnalia of unrestrained revelry and license such as the city had never before seen. Bells clanged. Siege guns—now that ammunition need no longer be conserved—boomed intermittently. Flags were everywhere. From early morning bands of musicians marched through the streets; at night they were joined by crowds of paraders carrying banners and sputtering flares. Hotel lobbies and saloons were jammed. Drunks—men and women—staggered forth to collapse in the streets. All shouts and songs were tuned to a single theme—"the war is over!"

The enemies who wore the gray uniforms were not the only ones with whom Washington had had to contend during the war years. Near-by Maryland and Virginia, just across the Potomac, abounded with civilian secessionists. Many of these were Confederate spies and dispatch runners.

The outbreak of hostilities had multiplied the activities of all Washington's public offices. To earn the high wages offered or to avoid the draft for military service, thousands of outsiders had flocked to the city and taken civilian wartime employment. This extraordinary influx of people had soon

filled existing hotels and boardinghouses to capacity. New facilities were rapidly improvised. Abandoned factories and warehouses were converted into so-called family hotels. In practically every block in the residential areas old houses, with their attics and back rooms renovated, blossomed forth with new window signs—ROOMS TO LET . . . ROOM AND BOARD . . . TRANSIENTS ACCOMMODATED.

One of these recently established boardinghouses was soon to claim the attention of all Washington. It was an eight-room, two-story brick and frame structure at 541 H Street, Northwest.[1] It was operated by a pious, middle-aged widow named Mary Eugenia Surratt. Mrs. Surratt (born Mary Eugenia Jenkins in 1820) traced an American and Protestant ancestry back to the mid-seventeenth century. Her forebears—English emigrants—had settled in Prince George's, Charles and St. Mary's counties in Maryland. They were farmers and, for the most part, slaveholders.

The child Mary attended a Catholic seminary in Alexandria, Virginia, until she was fifteen. While at this school she became a convert to the Catholic faith—a devotion which continued throughout her life. When she was sixteen she married John Harrison Surratt, a man twelve years her senior. Surratt was well born and had inherited substantial property—some of it was improved real estate in the District of Columbia.

In 1840 Surratt made a small cash payment and assumed a considerable mortgage for a tract of 1,200 acres of productive land from the Calvert Estate. The farm lay just across the Potomac in Prince George's County, Maryland. Thither Surratt moved with his wife and son Isaac to establish himself as a planter. It was here that the two younger Surratt children—John, Jr. and Anna—were born.

For a time the elder Surratt attended to his crops and prospered. With his profits he bought adjoining and near-by land. Where his properties abutted a crossroads he opened a general

[1] Now 604 H Street, Northwest.

store and barroom. Soon a blacksmith set up a forge, and Surratt acquired a neighboring gristmill. The little community came to be known as Surratts or Surrattsville. When a post office was established there in 1854, Surratt became its first postmaster.

The barroom proved Surratt's undoing. He began to gamble and drink heavily and to neglect the plantation. Such crops as he produced were scant and brought low prices. When cash was needed, Surratt realized it by selling, a little at a time, his choicest land. Part of the land was sold—on a promise of future payment—to a neighbor, John Nothey.

By 1857 Surratt had less than six hundred acres of his Maryland tract left—only the poorest parts of it.

Mrs. Surratt seems to have hoped that her elder son, Isaac, might help restore the family fortunes as he grew into manhood. In this, as in so much else, she was disappointed. Isaac was like his father. He rode fast horses, drank and gambled, and was almost continuously in trouble. In 1861, apparently with the approval of both parents, he left Surrattsville for Matamoros, Mexico, to take a job as a pony-express rider. That was the last either of his parents ever saw of him.

Surratt, Sr., worn out by his debaucheries, died in the summer of 1862. He left his affairs in deplorable shape. The Calvert heirs were pressing for the payment of their mortgage, and times were hard. Nothey and others who owed for land they had bought from Surratt were unable to pay. There was no slave labor to work the land. The bar—with more "deadheads" than paying customers—was a losing venture. The tavern which Mrs. Surratt had set up a few years before to accommodate transients cost more to operate than the uncertain revenue it produced. Young Johnny Surratt had proved a disappointment. After his father's death he had been appointed postmaster, but because of either his incompetence and neglect or the machinations of political enemies, he was removed in 1863. He was uninterested in the plantation, and seemed to have an aversion for any kind of useful work.

At her wits' end Mrs. Surratt decided to rent the planta-

tion, tavern and barroom and move to Washington to the debt-free house on H Street. There she would set up a boardinghouse. The rent from the Maryland properties could be applied to the Calvert debt, and the income from the boardinghouse would, enable her to provide a home for Johnny and Anna. She succeeded in leasing the plantation and buildings to John Lloyd, a retired Washington policeman.

The Maryland properties were a continuing burden. Nothey and others who owed her money could not or did not pay. Lloyd proved himself a thoroughly irresponsible tenant. He made no attempt to work the plantation and was in a drunken stupor most of the time. He paid no rent. And still the Calverts demanded payment.

Fortunately the boardinghouse prospered in the overcrowded city. Soon Mrs. Surratt had three steady boarders. One was Louis Weichman, a young man employed in the Washington office of the Commissioner of Prisons. Another was John Holohan, who brought with him his wife and two children. Holohan worked as a clerk in an office of the War Department. There was also a young girl, Honora Fitzpatrick. These three paid their board promptly. And additional, if fluctuating, revenue came from transients, most of whom paid. In this manner Mrs. Surratt eked out a meager livelihood.

The Surratts' life at both Surrattsville and Washington brought them into association with many people. The tavern and barroom at Surrattsville were usually crowded with customers and hangers-on who had nothing more pressing to do than drink and argue. People were constantly coming and going in the boardinghouse. Argument was inevitably directed first to the approaching conflict between the North and South and, after war was declared, to the war and the officers—military and civilian, Union and Confederate—who were carrying it on.

There was never any doubt about the sympathies of the Surratt family. John, Sr., like most of his customers and associates, was an outspoken and quarrelsome secessionist. Johnny,

while not so vocal as his father, was even as a child deeply sympathetic with the Rebel cause. In Washington he made acquaintances of other sympathizers and sometimes brought them to his home.

In January of 1865 young Surratt met the young and well-known romantic actor, John Wilkes Booth, then at the height of his popularity. Surratt and the actor became close friends and the handsome and suave Booth was, in the months that followed, a frequent and welcome visitor in the Surratt home.

Booth proclaimed freely and loudly his conviction that the South, despite its present deplorable lack of men and equipment, was bound to win. He boasted that before the war he had belonged to the Richmond Grays, a volunteer military organization, and had not enlisted in the regular Confederate Army only because he had promised his mother he would not do so. There were, he declared, other ways in which he had helped and could still help the South.

Booth and Johnny were much together. Johnny told his mother of business he had with Booth—something to do with cotton and oil. Often this business took him out of town, and with the passing months his absences became more frequent. Only later did Mrs. Surratt learn that Johnny had become a secret agent for the Confederacy and was smuggling contraband and dispatches to and from Richmond, Washington and points farther north and in Canada.

There were some strange callers at the Surratt lodging house. One day in February 1865, an awkward, rough-looking stranger with a heavy German accent presented himself and asked for room and board. He had come, he said, from Port Tobacco. Although he was not a "gentleman" by Mrs. Surratt's standard, she took him in because she had a vacancy. When, the very next day, she discovered a couple of empty liquor bottles in his room, she decided he was an undesirable lodger and told Johnny to order him to leave. Johnny protested but Mrs. Surratt held to her determination and the stranger moved on to other quarters. The man's name was George T. Atzerodt, but Mrs. Surratt and all the members

of her household except John and Weichman knew him as "Port Tobacco."

In early March another applicant for accommodation—a giant of a man—appeared at the Surratt home. He gave his name as Wood and his profession as a Baptist minister. Mrs. Surratt did not think he looked or acted much like a preacher, but she took him in. He stayed only one night but returned on the thirteenth of the month and for three nights shared a room with Weichman.

On the fifteenth Johnny returned from one of his out-of-town trips. From the way he greeted Wood it was evident the two knew each other. Wood, it turned out later, was also known as Lewis Payne. That name, too, was an alias. The man's real name was Lewis Powell, and he was a deserter from the Confederate Army.

Two other transients availed themselves of the hospitality of the boardinghouse during March and April of 1865. One of these, a Gus Howell, was already known to Mrs. Surratt. He had served with the Confederate forces in the early years of the war. The other was introduced—probably by John Surratt—as Mrs. Slater. It was later discovered that both Howell and Mrs. Slater were secret agents of the Confederacy.

While managing all the boardinghouse affairs, Mrs. Surratt had also to look after her properties and debts in Maryland. On Tuesday, April 11, she went to Surrattsville to see John Nothey about his debt. Weichman drove her there. On the way they met and spoke briefly to John Lloyd and his sister-in-law, Emma Offutt, who were driving toward Washington.

Nothey was at Surrattsville and Mrs. Surratt discussed with him the payment of his debt. He was, he said, prepared to pay it in full as soon as Mrs. Surratt could arrange with the Calverts to give him clear title. Apparently satisfied by this promise, Mrs. Surratt returned to Washington.

On April 14, which was Good Friday, Mrs. Surratt attended early church services. When she returned she was handed a letter, just delivered, from the Calvert heirs. It was curt and

threatening—they had heard that Nothey was prepared to pay his debt to her and insisted she settle with them at once. Immediately she got ready for a second trip to Surrattsville. Weichman was home and offered to drive her, so she gave him money and sent him to hire a horse and buggy. In the early afternoon he drove up in front of the house, ready to start on the thirteen-mile journey.

Just as they were about to leave, Booth appeared. He told Mrs. Surratt he had something for John Lloyd and asked her to give it to him and tell him that someone would call for it later. Mrs. Surratt promised she would, and Booth handed her a small package wrapped in brown paper.

The trip proved disappointing, for Mrs. Surratt did not see Nothey. She did stop in the Surrattsville tavern long enough to write him a sharp note threatening immediate suit and foreclosure unless he paid his debt at once. While at the tavern she saw and talked to her brother, Zad Jenkins, and to Mrs. Offutt. John Lloyd drove up just as they were about to leave, and she also spoke with him

Mrs. Surratt left the brown package entrusted to her by Booth at Surrattsville. With whom she left it and what she said about it were to become momentous questions in the days which lay ahead.

It was dark night when Mrs. Surratt and Weichman returned to the Washington boardinghouse. Exhausted by the day's exertions Mrs. Surratt retired early.

At two o'clock in the morning she was startled out of a deep sleep by the sounds of heavy voices and an incessant pounding on her front door. A frightened Weichman rushed to the front of the house.

"What is it? What do you want?" he tremblingly inquired.

The reply came sharply, "Police. Open up in the name of the law!"

Weichman unlocked the door, and four men, two of them in police uniforms, pushed their way into the room.

"Where's John Surratt?" one of them demanded.

"He's not here," said Weichman. "He's away."

"His mother here?" pursued the officer. Mrs. Surratt stepped forward. "We want to see your son, John," said the policeman. "Where is he?"

"He hasn't been here for two weeks," answered Mrs. Surratt. "I had a letter from him today; I think he's in Canada."

"When did you see Wilkes Booth last?" The officer's tone was sharp and threatening.

"Booth?" said Mrs. Surratt, "Why, I saw him this afternoon. He asked me to take something out to Surrattsville for him. Why are you asking me all these questions? What's the trouble? What does it all mean?"

"Just this, ma'am," said the policeman in a slightly milder tone: "Your friend Booth has just killed President Lincoln and they think your son has murdered Secretary Seward!"

Then there were more questions—mostly concerning John Surratt. It was near daybreak when the officers finally left. Weichman and Holohan were ordered to report at police headquarters later in the morning.

Washington and the nation got the first news of Lincoln's assassination through the official bulletins issued by Edwin M. Stanton, Secretary of War. The first, released at 2:15 A.M. on April 15, contained this terse information:

Last evening, about 10:30 P.M., at Ford's Theatre, the President, while sitting in his private box with Mrs. Lincoln, Miss Harris and Major Rathbone, was shot by an assassin, who suddenly entered the box and approached behind the President. The assassin then leaped upon the stage, brandishing a large dagger or knife, and made his escape in the rear of the theatre. The pistol ball entered the back of the President's head and penetrated nearly through the head. The wound is mortal. The President has been insensible ever since it was inflicted and is now dying.

About the same hour an assassin (whether the same or another) entered Mr. Seward's home and, under pretense of having a prescription, was shown to the Secretary's sick chamber. The Secretary was in bed, a nurse and Major Seward with him. The assassin immediately rushed to the bed, inflicted two or three stabs on the throat and two in the face. It is

hoped the wounds may not be mortal; my apprehension is that they will prove fatal. The noise alarmed Mr. Frederick Seward, who was in an adjoining room and hastened to the door of his father's room, where he met the assassin, who inflicted upon him one or more dangerous wounds. The recovery of Frederick Seward is doubtful.

A second bulletin, released two hours later, read:

The President still breathes, but is quite insensible, as he has been ever since he was shot. He evidently did not see the person who shot him, but was looking on the stage as he was approached behind.

Mr. Seward has rallied and it is hoped he may live. Frederick Seward's condition is very critical. The attendant who was present was stabbed through the lungs, and is not expected to live. The wounds of Major Seward are not serious. Investigation strongly indicates J. Wilkes Booth as the assassin of the President. Whether it was the same or a different person that attempted to murder Mr. Seward remains in doubt. . . . Every exertion has been made to prevent the escape of the murderer.

The third and final bulletin, issued at 8:00 A.M., announced: "Abraham Lincoln died this morning at 22 minutes after seven o'clock."

The last bulletin was coupled with an official press release by Stanton that the murder of the President and the attempted murder of Secretary Seward had been part of a conspiracy headed by high-ranking officials of the Confederate Government. The original plan was to assassinate all of the members of the Federal cabinet and General Grant, and thus to plunge the nation into a state of anarchy. The release added that the authorities had the matter well in hand: Booth's capture was imminent and apprehension and punishment of all concerned in the diabolical plot would be swift and certain.

In Washington the mobs which but a short twelve hours before were rioting through the streets were suddenly still.

The city put on mourning. Men and women, with heads bowed, passed and repassed the building across the street from Ford's Theatre where the President's body lay. Flags were lowered to half-mast; somber black had replaced the red, white and blue streamers on the buildings. Bells rang, but slowly, and in deep tones. And as it was in Washington, so it was throughout the land. The nation—South as well as North—mourned the passing of the simple man whose creed had been: "With malice toward none; with charity for all. . . ."

In the Surratt household there was fear as well as sadness. Weichman and Holohan had left early Saturday morning for police headquarters. At midnight they had not returned. Mrs. Surratt, Anna and Mrs. Holohan passed a sleepless night.

At last it was morning, and Easter Sunday. Still Weichman and Holohan had not returned. The women attended early Mass and returned home to wait out a long day. Anna and the colored servants brought in the gossip of the streets: Booth had not been caught; the secret service—Stanton's secret service, headed by his personal appointee and friend, Colonel Lafayette Baker—had taken the case away from the Washington police department; rioting and the beating of Southern sympathizers were widespread; dozens of arrests had been made; Jefferson Davis himself had masterminded the assassination plot.

At ten o'clock Mrs. Surratt went to her room (a back one on the ground floor) to prepare for bed. Suddenly she was startled by a heavy pounding on the door. She hastened to the front of the house and cried, "Who is it?"

"Major Smith, United States Army. Open the door."

Mrs. Surratt unlocked it and ushered the officer into the parlor. His manner was courteous. In answer to his questions, Mrs. Surratt said she was Mary Surratt, and the mother of John H. Surratt.

"Mrs. Surratt," said the officer, "I have come to arrest you and all of your household and take you to General Augur's headquarters in the War Department for questioning."

"Questioning about what?" said Mrs. Surratt.

"Madam," replied Major Smith, "you are to be questioned concerning the assistance given Booth in the murder of the President, Abraham Lincoln."

"Assistance to Booth?" said Mrs. Surratt incredulously. "Booth has had no assistance from anyone in this house."

Further conversation was interrupted by the cries of Anna Surratt, who had followed her mother and heard the major's announcement. The girl had given way to a fit of hysterical weeping, and it was some time before her mother could quiet her.

Major Smith permitted the three women—Mrs. Holohan was also to be taken to headquarters—to go to their rooms and assemble a few of their clothes and personal belongings. When they returned, the parlor was filled with police and soldiers. Flanked by guards on either side Mrs. Surratt, Anna and Mrs. Holohan were marched toward the hallway door. They had hardly started when the doorbell clanged. The major, with a group of his men, rushed outside, but in a matter of seconds he was back. He was visibly excited.

"Mrs. Surratt, come here," he said sharply.

She was hurried into the dimly lighted hallway. There between two soldiers stood a tall, haggard, wild-looking man, his bearded face streaked with mud, a dirty rag forming a cap around his head, his clothes torn and caked with mud. In his hand he held a broken pickax. On the floor beside him lay a slime-covered shovel.

"Do you know this man?" shouted Major Smith.

"Before God," answered Mrs. Surratt, "I have never seen this man before."

Fatal statement! That man was her erstwhile transient, the pseudo-Baptist preacher, Wood, alias Payne, alias Powell, and he was shortly to be identified as the assailant of Seward, the Secretary of State.

The women were rushed to the offices of the War Department. Far into the night they were questioned, mostly about the whereabouts and recent activities of John Surratt. The

interrogators thought the haggard, ragged and mud-covered creature who had appeared at the Surratt front door that night was John Surratt. The man was finally brought before Anna. He no longer wore the ragged cap. The mud had been washed from his face and hands.

"That's your brother, isn't it?" queried the inquisitor.

"No, no," the girl declared. And then, after looking at the man closely, she identified him as Wood, the professed Baptist preacher, who had stayed at their house.

In the early hours of Monday the three women were removed to the old Capitol Prison.

Capitol Prison had a history. It had opened in 1800 as a tavern, but in 1814, after the burning of Washington by the British, had been converted into a meeting place for the Congress. Two Presidents had been inaugurated there. When the new Capitol was completed, the makeshift one was relegated to less glamorous uses—for a while it was a private school and then was reconverted into a tavern. In 1861 the government took it over again, added an annex—the Carroll Prison—and used the whole as a wartime detention station. By the end of the war it had acquired a sinister reputation. The writ of habeas corpus had been suspended, and the military seized suspected disloyalists without warning and sometimes, perhaps, without reason. The victims disappeared behind the grim walls of the prison. In the popular mind the old Capitol Prison became another Bastille. The unlimited authority of the Secretary of War to order the arrest and detention of suspects without charges or trial had all the effectiveness of *lettres de cachet.*

In this forbidding structure the inquisition was resumed. Mrs. Holohan was soon released. Anna was questioned but it became apparent even to her prejudiced examiners that the girl knew nothing of the present whereabouts of her brother or the activities or plans of Booth and his associates. But she was detained in Capitol Prison, even after her mother had been removed.

With Mrs. Surratt it was different. As soon as one questioner exhausted himself another took charge. Questions, questions, questions—the same ones over and over again. When had she last seen her son? Hadn't he been in Washington on April 14? Where was he hiding now? Hadn't she known that he was a Confederate spy, carrying dispatches between the Rebel Government at Richmond and the friends of the Confederacy in Canada? Hadn't she known of Booth's plan to murder the President? Hadn't she carried messages from Booth to John Lloyd to have the "shooting irons" ready when he should call for them? Hadn't she entertained Atzerodt and Payne at her house? Hadn't she known that they were Booth's coconspirators? Why hadn't she told the officers on the night she was arrested that the man who came to her door was Payne? Didn't she know the men—Herold, Mudd, Spangler, O'Laughlin and Arnold—who had been arrested or were being sought as parties to the conspiracy to murder the President, the Vice-President, the Secretary of State and General Grant? Hadn't she entertained Gus Howell and Mrs. Slater at her house? Hadn't she known that they were Confederate dispatch riders and blockade-runners?

Mrs. Surratt stood up well under the exhausting ordeal. The examiners ascribed her fortitude not to her honesty, but to her "cleverness," her "nerves of steel," and her "consecration to the Confederate cause."

Her story never varied. Her son John had brought Booth to her house. He had told her they had common interests in the cotton and oil business. If they were engaged in other activities she knew nothing of them. She had a letter from him on Friday the fourteenth, the day of the assassination. It was dated April 12 and had been mailed from Montreal. She did not know and did not believe that her son was a Confederate spy.

She denied she had ever carried a message from Booth to Lloyd about "shooting irons." On April 14 at Booth's request she had taken a small wrapped package to Surrattsville. She

had other business there and did it to accommodate her son's friend. Booth had told her to give it to Lloyd and to tell him to hold it until someone called for it. Because Lloyd was not there when she reached Surrattsville, she had given the package to Mrs. Offutt and told her to give it to Lloyd. As she was about to leave Lloyd drove up and she told him there was a package for him in the house which someone would call for later. She never knew what the package contained.

She admitted that Atzerodt and Payne had roomed at her house—the former for only one night. She had never known Payne under any name other than "Wood." She had not recognized him on the night of the sixteenth because the hallway was dark, her eyesight at night was very poor and the ragged, mud-covered, bearded man with the pickax bore no resemblance to the well-groomed gentleman whom she had known as Wood, the Baptist minister.

Herold, she admitted, she had seen once or twice, but she had never talked to him. Dr. Mudd, Spangler, O'Laughlin and Arnold she had never seen at all. It was true that Howell and Mrs. Slater had spent a night or two at her house—they were transients who had sought lodging there. She certainly had not known when they stayed with her that they were in the service of the Confederate Government.

Most vehemently and persistently Mrs. Surratt denied all knowledge of a plot to kidnap or murder the President or to murder any other governmental officials.

Her denials helped her little. Mrs. Surratt was held in the Capitol Prison until May 1, when she was transferred to Arsenal Prison at 4½ and T streets, Southeast. The removal did not improve her situation. Arsenal Prison, formerly known as the Federal Penitentiary, was a somber pile with a history more gloomy than that of Capitol Prison. It had been built as a penitentiary under the personal direction of President John Quincy Adams. Until the outbreak of the Civil War it had been used for its original purpose; then it was converted into an arsenal, thus earning its later name. When all the

Washington prisons had been filled to capacity with suspected disloyalists it was again made a penitentiary.

Incarceration in Arsenal Prison must have been a harrowing experience To prevent prisoners from talking to one another and plotting escape, the separate cells had been constructed so small that no more than one person could be put in one of them. Mrs. Surratt was placed in one of these tiny, oppressive cells—it was approximately five feet square and less than six feet in height. A pile of straw served as a bed. There was no light except that which filtered through the barred door or was reflected from the lanterns of the guards. As if these conditions were not severe enough, shackles were clamped on Mrs. Surratt's ankles to restrict her movements.

From May 1 to May 8 the monotony of Mrs. Surratt's imprisonment was broken only by the visits and prolonged questionings of Colonel Lafayette Baker of the United States secret service. After Booth's death Secretary Stanton had put Baker in command of Arsenal Prison, and charged him with responsibility for the safe custody and further questioning of the suspected conspirators.

Baker was an experienced inquisitor. His visits to Mrs. Surratt followed no schedule. He came at all hours of the day or night. With his questions and the distortion of her answers went insidious suggestions that this or that variation in her story might win her consideration with the all-powerful Secretary of War. But Mrs. Surratt had told her story, and even the tactics of as shrewd and unprincipled an examiner as Baker failed to shake it.

It was well into the night of May 8 when Mrs. Surratt learned of the specific charge against her. She was roused from her sleep by the command of Colonel Hartranft, the military commission's messenger extraordinary. Soldiers held their lanterns while the general read from a paper.

It is doubtful that the woman gleaned much more from the confusing legal verbiage that was read than that she was charged with having been one of Booth's accomplices in the

murder of Lincoln. When the reading was finished, she was told that her trial would commence at ten o'clock the following morning.

Meanwhile governmental authorities had prepared to prosecute the suspected conspirators. On the day after the assassination Secretary of War Stanton announced that the trial would be conducted by a military commission. Immediately public controversy was evoked. Eager as the people were to convict the murderers of their President, there were many who questioned the legality of a trial by a military tribunal. The dispute was to continue throughout the trial and for years afterward. The proadministration newspapers argued the necessity for such a trial so that swift and certain punishment might be meted out to the guilty and so that "other secessionist traitors [would be] deterred from following their example." The antiadministration press, following the challenging voice of Horace Greeley in the New York *Tribune*, demanded a constitutional, civil trial.

United States Attorney General Speed was asked for his opinion. It was rumored that Speed had informally expressed doubt about the legality of such a commission, but when he rendered a formal opinion, he unequivocally held that the seven men and one woman then under arrest were properly triable by a military commission to be appointed by the Secretary of War. He gave two reasons: the crime had been committed in a time of war against the Chief Executive and Commander in Chief of the military forces of the United States and in a military zone under martial law. The fact that throughout the war grand juries had returned indictments and the civil courts of the District of Columbia had tried both civil and criminal cases without interruption was held to be of no consequence.

On May 5 the Secretary of War announced the appointment of a nine-man military tribunal to try the accused. All were either close personal friends of Stanton or under obligation to him for their previous appointments. All were radicals and bitter opponents of the South.

Major General Hunter was named president of the commission. He was fifty-three years old, a graduate of West Point and a veteran of the Mexican War. During part of the War between the States he was in command of the Department of the West.

The eight other members of the commission were also Union officers—Major General Lewis (Lew) Wallace, Brevet Major General Augustus V. Kautz, Major General Albion P. Howe, Major General Robert S. Foster, Brigadier General James A. Ekin, Brigadier General Thomas M. Harris, Brevet Brigadier General Charles H. Tomkins and Brigadier General David R. Clendenin.

Stanton selected Judge Advocate General Joseph Holt, a sixty-one-year-old lawyer of nearly forty years' experience, as chief prosecutor. Before the war Holt had held numerous important public offices: Commissioner of Patents (1857), and Postmaster General and Secretary of War in the cabinet of President Buchanan. He was a devoted adherent of Stanton.

Assisting the Judge Advocate General were Colonel John A. Bingham and Brigadier General Henry L. Burnett. Colonel Bingham had practiced law for more than twenty-five years, had served as a United States district attorney and from 1854 to 1863 had been a member of Congress. He was an able, experienced and forceful advocate. General Burnett was a much younger and less experienced man than the Judge Advocate General. He had been admitted to the bar in 1859, but at the outbreak of hostilities had joined the Union forces as a captain of a volunteer company of Ohio infantry. Shortly before the Surratt trial he had served as a specially deputed judge advocate in the prosecution of Lambdin P. Milligan before a military commission at Indianapolis, Indiana. His success in that assignment—Milligan was sentenced to hang—undoubtedly accounted for his selection as one of the prosecutors of Mrs. Surratt and her codefendants. Burnett was a man of exceptional ability and in his later life acquired great distinction as an advocate and counsellor.

To complete the roster Stanton appointed Major General J. F. Hartranft as Special Provost Marshall General. His duty was to execute the orders of the military commission.

The reason that had been given for Mrs. Surratt's removal to Arsenal Prison was that the hearing room of the military tribunal which was to try her and her alleged coconspirators would be a large room on the third floor of that building. Stairways and corridors connected the hearing room and the cells in which the defendants were confined. On May 9 the commission appointed by Stanton assembled in the hearing room. Shortly before ten o'clock two guards unlocked the door of Mrs. Surratt's cell and led her through the corridors to the courtroom. Her progress was slow because of the short chain which hobbled her ankles.[2]

The improvised courtroom into which the woman was ushered was in the northeast corner of the third floor of the building. It was about thirty feet wide and forty-five feet long, with a high ceiling supported in the center of the long way of the room by spaced iron columns. Three of the side walls were solid masonry. On the other side, which faced the street, were three large iron-barred windows. The floor had been covered with a makeshift matting. Tables and chairs had been arranged to give the place the appearance of a courtroom. A solid partition about thirty inches high built across the west end of the room about three feet out from the wall served as a prisoners' dock. In front of the dock were tables and chairs for defense counsel. Farther to the east were accommodations for the official shorthand reporters of the proceedings. On the north or window side of the building was a long table behind which sat the nine blue-uniformed judges,

2 There is much confusion in contemporary and later accounts as to whether Mrs. Surratt was manacled when she was taken into the courtroom and, if so, for how long after the trial started. These are exhaustively reviewed by the eminent Lincoln scholar, Otto Eisenschiml, in *In the Shadow of Lincoln's Death* (New York: Wilfred Funk, Inc., 1940). Mr. Eisenschiml, with strong supporting authority, concludes that Mrs. Surratt was probably chained at the ankles during her imprisonment and at the commencement of her trial, but that as the proceedings progressed, and newspaper criticism of this unnecessary brutality increased, the manacles were removed.

the judge advocate general and his two assistants. A witness chair faced the judges.

It is doubtful whether Mrs. Surratt, when she was led to her seat at the extreme south end of the prisoners' dock, noticed these physical arrangements. Her attention must have been riveted on the strange array to her left in the prisoners'

The courtroom in which Mrs Surratt was tried. Mrs. Surratt is shown in the left rear corner, the military commission at the right, reporters in the center and defense attorneys in front of the railing behind which the defendants are seated.

dock. There sat seven men. Hoods of thick padded cloth completely covered their heads, except for slits opposite their mouths. Cords attached to the hoods and passed under the arms held the bizarre objects in place.[3] The hands and feet of each man were manacled. The defendants were joined to one another by a long iron bar attached to their ankles. Seven iron balls, each weighing seventy-five pounds, were fastened to the bar. As the men entered and left the courtroom one

[3] These had been placed and kept continuously on each man after his arrest; the reason, officially given out, was that it was a necessary precaution to prevent communication with anyone who might aid a rescue or escape.

of the two guards assigned to each defendant had to carry the iron ball so the man could walk.

The special provost marshal declared the court in session, and the hoods were removed from the heads of the men. Mrs. Surratt then recognized Herold, Atzerodt and Payne. The others—Dr. Samuel Mudd, Michael O'Laughlin, Samuel Arnold and Edward Spangler—she had never seen before.

Someone called her name, "Mary Eugenia Surratt," and asked whether she desired the assistance of counsel. She answered, "Yes." A similar question put to each of the other defendants elicited the same answer. Because none of them had lawyers, the commission declared an adjournment to the following day.

*May 10, 1865.* The tribunal convened at 10:00 A.M. The charges and specifications were read. Each defendant was called by name and asked to plead. All pleaded not guilty.

The general charge made against the defendants jointly was that they had maliciously, unlawfully, traitorously, and in armed rebellion against the United States of America, on or before the sixth day of March, and on divers other days between that day and the fifteenth of April, 1865, combined, confederated and conspired with John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young,[4] and others unknown, to kill and murder President Abraham Lincoln, Vice-President Andrew Johnson, Secretary of State William H. Seward and Lieutenant General of the United States Army, Ulysses S. Grant; and in pursuance of that conspiracy, on April 14, 1865, in association with John H. Surratt and John Wilkes Booth, murdered President Lincoln, assaulted with intent to murder Secretary of State William H. Seward, and lay in wait with intent to kill and murder Vice-President Johnson and General Grant. This general indictment was followed by

[4] Sanders, Tucker, Thompson, Cleary, Clay, Harper and Young were officers or agents in the services of the Confederacy.

specifications as to the particular parts Herold, Payne, Atzerodt, Spangler, Mudd, O'Laughlin, Arnold and Mrs. Surratt had played in the conspiracy.

President Hunter, after reading the indictment, made a number of announcements. Two of them were quite extraordinary. One barred the presence of press reporters—the judge advocate general might release such information to the public as in his opinion would not jeopardize the general security.[5] The other was that no person would be permitted to appear as counsel for any of the defendants unless or until he had taken the oath of allegiance to the Union which had been prescribed by Act of Congress in 1862.

It was ordered that the witnesses be separated and excluded from the courtroom until called to testify.

None of the defendants was at any time furnished with a list of the witnesses that would be called by the Government.

*May 11, 1865.* A few minutes before ten o'clock two young men were shown into Mrs. Surratt's cell. They introduced themselves as lawyers who had come to volunteer their services in her defense. Although Mrs. Surratt had never seen either of them before, she said she would be glad to have them represent her. They gave their names as Frederick A. Aiken and John W. Clampitt.

Aiken was twenty-eight years old and a graduate of Harvard Law School. He had engaged in newspaper work before 1861, and served as a volunteer with the Union military forces until 1864. Just when he was admitted to the bar is not quite clear, but it is very likely that Mrs. Surratt was his first client.

Clampitt was only twenty-five. He had been admitted to the bar in 1864, and it is altogether probable that he too made his first major appearance in any courtroom in the Lincoln conspiracy trial.[6]

[5] In the face of a storm of criticism this prohibition was lifted before the actual taking of testimony got under way.

[6] After the conspiracy trial Aiken practiced law for something less than three years, when he resumed newspaper work. Clampitt went on to become a prominent and well-regarded lawyer.

When the court convened two other lawyers—Major General Thomas Ewing and Mr. Frederick Stone—announced that they would represent Dr. Samuel Mudd.

Thomas Ewing was a distinguished soldier, lawyer and citizen. He had served as a United States Senator, and had been a member of the Harrison and Tyler cabinets. Before the Civil War he had practiced law with conspicuous success in Cincinnati, Ohio, and Leavenworth, Kansas. He was a member of the Leavenworth Constitutional Convention and the first Chief Justice of the Supreme Court of Kansas. He entered the war as a colonel of volunteers, and emerged in 1865 as a major general. He was capable, bold and resourceful. Some of his boldness in standing up to the military commission has been attributed to the fact that he was a brother-in-law of General William Tecumseh Sherman, next to Grant the most popular military figure in the North.

Frederick Stone was twenty-five years of age, a resident of Maryland, and a lawyer of ability and experience.

None of the other defendants had been able to secure counsel and they pleaded for more time. The commission recessed until the following day.

*May 12, 1865.* When the commission convened, Mr. Stone announced that "at the request of [Herold's] mother and his estimable sisters" he would undertake the representation of that defendant as well as that of Dr. Mudd.

General Ewing volunteered to represented Arnold as well as Dr. Mudd. Atzerodt, O'Laughlin, Spangler and Payne were still without counsel, but the Court ordered the prosecutors to proceed with the trial.

A number of witnesses[7] testified that Booth and John Surratt had plotted with Sanders, Thompson, Clay, Tucker, Cleary and others named in the general charge of the indictment. The latter, they said, were agents of the Confederacy in Canada and, in concert with Booth and John Surratt, had planned the burning of New York and other Northern cities,

[7] Several of these witnesses were afterward charged with, tried and convicted of having given perjured testimony.

the spreading of yellow-fever germs, the poisoning of water reservoirs and the wholesale slaughter of Union-held prisoners of war. The commission adjourned when the last of these witnesses had been heard.

Mrs. Surratt had been returned to her cell and had lain down on her pallet of straw to rest. Shortly she was aroused by one of her guards and told that her lawyers, Aiken and Clampitt, wanted to see her. When they entered the cell they were accompanied by a distinguished-looking elderly gentleman whom they introduced as Judge Reverdy Johnson.

Reverdy Johnson was probably the ablest and best-known trial lawyer in the United States at that time. He had served his native state of Maryland in numerous capacities, had been Attorney General of the United States from 1849 to 1850 and was presently Maryland's representative in the United States Senate.

At the moment this veteran attorney was concerned about the conspiracy case. He asked Mrs. Surratt to tell her story. To his searching and sharply worded questions she gave prompt and straightforward answers which convinced him of her innocence. Before he left her he volunteered his services.

*May 13, 1865.* When the tribunal assembled, Mr. Clampitt presented Judge Johnson as an associate counsel for Mrs. Surratt. There was an unexpected response. General Hunter, president of the commission, had in hand and read a statement which had been prepared by his associate, General Harris. This statement questioned the propriety of admitting Judge Johnson as one of Mrs. Surratt's attorneys, because Johnson, as a member of a recent constitutional convention in Maryland, had given his associates an opinion in which he denied that persons taking an oath designed as a test of loyalty to the United States Government were morally bound by that oath.

Judge Johnson bitterly resented this premeditated insult. He met the situation, however, with a restraint and calm dignity which gave emphasis to his devastating reply. He patiently and pointedly explained that the opinion he had given

concerned an oath prescribed by the Maryland Constitutional Convention. He had ruled that the provision was beyond the legal authority of the convention. Every intelligent lawyer, he said, who had considered the matter agreed with him. The provision which prescribed the oath carried severe penalties for its violation, and for that reason he had given it as his opinion that a citizen who took the unconstitutional oath in order to protect his rights under the Constitution was not committing an unmoral act. The suggestion that he had said that a *valid* oath of allegiance to the Union imposed no moral obligation on the citizen who took it was a plain distortion of the opinion he had given.

Judge Johnson's rhetoric was brilliant but it only served to strengthen the resentment of the members of the court. When Judge Johnson had finished the courtroom was cleared and the generals deliberated. After a few minutes proceedings were resumed. The president announced that the objection had been withdrawn. The commission had yielded —but not to the force of Johnson's argument. The generals quite accurately apprehended that to bar Judge Johnson from the case would evoke widespread public protest.

The debate between the commission and Judge Johnson was in the end disadvantageous to Mrs. Surratt. Judge Johnson had antagonized the commission. He realized it and, rightly or wrongly, concluded that his continued presence in the trial and his cross-examination of the Government's witnesses might injure rather than help Mrs. Surratt's cause. His subsequent appearances before the commission were few, and they were usually brief. He did prepare an argument against the legal right of any military commission to sit in judgment on the defendants. It was a masterpiece, but was by no means the equivalent of the superb talent with which he might have labored for Mrs. Surratt throughout the trial had he felt free to shoulder the burden of her defense.

By the time the argument over Judge Johnson's appearance for Mrs. Surratt had been settled, the remaining defendants had secured counsel. General Ewing said that he had taken

on the representation of Spangler. William E. Doster announced he had been retained by Atzerodt's family to represent their kinsman. When no other lawyer appeared for Payne, Mr. Doster agreed to represent him. Walter S. Cox appeared for O'Laughlin.

Mr. Doster, while but twenty-eight years of age, had had a remarkable preparation for the law. He had studied at Harvard, Heidelberg and the Sorbonne. And although he had had but little trial experience, he displayed in the representation of his clients before the commission the brilliance and promise which was fully realized in his later distinguished career at the bar.

Mr. Cox, thirty-nine years old, was a graduate of Georgetown University and Harvard Law School. He was admitted to the bar in 1847, and had won high esteem as a trial lawyer.

Each of the defendants, through counsel, petitioned the commission for a separate trial. The judge advocates opposed the motion and it was promptly overruled. Separate pleas which assailed the legal authority of the military commission to try the defendants followed. These too, after scant consideration, were overruled.

The hearing of testimony was now renewed; it continued for thirty days, interrupted only by Sundays and a two-day adjournment for a victory parade of the Grand Army of the Republic.

The prosecution called altogether a hundred and fifty witnesses. The testimony of more than a third of these related to the charge that Jefferson Davis and other leaders of the Confederacy had conspired with Booth and John Surratt to murder President Lincoln, Vice-President Johnson, Secretary of State Seward and Lieutenant General Ulysses S. Grant.[8] While the testimony fell far short of these targets, its sensational nature did serve to keep the popular prejudice against

8 Davis, Thompson and Clay were arrested and in Federal custody soon after the War's close, but no effort was made at any time to bring them to trial on the indictment in which they were jointly charged with the same crimes of which Mrs. Surratt and her seven codefendants stood accused.

the eight defendants at white heat. Much of this testimony was later conclusively proved to have been solicited perjury.

## The Testimony Concerning Booth

Except so far as it implicated particular defendants, the great mass of evidence concerning Booth's part in the assassination of the President was not contradicted. A number of witnesses repeated Booth's threats first to kidnap and later to kill the President. The kidnaping plot was not altogether a fantastic scheme. Despite the many threats that had been made against Lincoln's life and security, the steps taken for his protection were absurdly inadequate. The President himself was somewhat to blame, for he disliked surveillance and avoided it wherever he could. It was his habit to make—many times unaccompanied by guards or secret-service men—unannounced and unexpected calls on both civil and military officers. It was Booth's idea that on one of these occasions a small group of determined men could waylay the President, overcome what meager protection he might have and carry him south of the Potomac. Booth's plan was to deliver the President to the leaders of the Confederacy; they, in turn, would surrender him to the North only after all Confederate prisoners had been released and returned. In October of 1864 the War Department had ordered all exchanges of prisoners of war to be suspended. Ninety-eight thousand Confederate soldiers were confined in Northern prisons. With these men back in Lee's army, Booth thought, the tide of battle could be changed and the war continued.

The evidence did not indicate clearly just when Booth abandoned the kidnaping plan and decided on the assassination of Lincoln and other Union leaders.

Many witnesses took the stand to fill in the details of the President's murder. Major Henry R. Rathbone, who with his fiancée had accompanied President and Mrs. Lincoln to the theater and had shared the Presidential box, gave a graphic description of the shooting. He told how he himself had

grappled with and had been stabbed in the arm by the assassin and how Booth had leaped from the box to the stage.

Nine witnesses who had been in the audience corroborated Major Rathbone and added some details. As Booth jumped the spur on one of his boots caught in the fold of an American flag draping the box. The actor fell heavily on the stage—he had, as it was later discovered, broken his ankle. A bewildered audience saw him stagger to his feet and limp across the stage with a bloody dagger in his hand; it heard him shout, *"Sic semper tyrannis!"*

On the stage the actors and stagehands were as persons struck dumb. As Booth ran limpingly to the rear entrance, no one was capable of stopping him. In the alley his horse was saddled and waiting. He mounted, put spurs to the animal and headed south at breakneck speed.

More than twenty witnesses then told of the chase, which ended twelve days later when Booth was shot to death in Garrett's tobacco barn near Port Royal, Virginia.

A score or more witnesses were called to establish an association among Booth, Payne, Atzerodt and Herold and to show that this affiliation continued up to the night of the assassination. This testimony was not disputed but Spangler's and Dr. Mudd's participation in the murder plot was vigorously challenged. These two, if guilty at all, were guilty as accessories *after* the fact.

It was conceded that O'Laughlin and Arnold had been associated with Booth in his earlier plot to abduct the President, but it was strenuously contended that neither of them had had any association with Booth after that scheme had been abandoned.

The Government's contention that Mrs. Surratt conspired with Booth was based largely on the fact that during the two months preceding the assassination Booth, Payne and Atzerodt had lived in or visited at her house and had held secret conversations with her and her son, John. It was also assumed that she had had guilty associations with the other defendants and with other known enemies of the Union.

To understand the force, or lack of it, of the evidence against her, it is necessary to review briefly the cases made by the Government against the other defendants with whom she shared the prisoner's dock.

## The Case Against Edward Spangler

Edward Spangler was a scene-shifter and handy man about the theater. At the time of his trial he was about forty-five years of age. He drank heavily, but was generally regarded as a harmless, good-natured, friendly individual who accommodated and helped everyone around the theater. He was especially fond of Booth and delighted to serve him.

The Government had already proved, before it presented its evidence directed particularly against Spangler, that someone had tampered with the Presidential box. Immediately after the murder, it was discovered that the assassin, or someone working with him, had fixed the box so that Booth could see the seating disposition of the occupants and so that he would not be interrupted until his criminal purpose had been accomplished.

The theater management was expecting the President's party and had removed the partition between Boxes 7 and 8 to accommodate the extra guests. The door to Box 7 was supposed to be locked. It was found that the keepers—the part of the locks in the door jambs—had been loosened so that the doors to both boxes could be pushed open even if the bolts were turned in the locks. Furthermore, a hole, a quarter of an inch in diameter, had been bored at eye level through the door of Box 7. The hole was freshly made, apparently with a gimlet and enlarged with a penknife.

A narrow corridor with a door at its entrance led from the dress circle to the boxes. Someone had gouged a hole about three inches long and an inch deep in the plastered wall inside the door. There was also a cut in the door molding opposite the cut in the wall so that a bar could be wedged against the

door and it could not be opened into the corridor. Immediately after the assassination Major Rathbone found such a bar, a piece of wood two inches thick, two inches wide and three and a half feet long.

The specific charge against Spangler was that he had helped Booth obtain entrance to the President's box, had barred the door to prevent aid from reaching the President and later had aided and abetted Booth in his escape. It was the Government's contention in the trial that Spangler, while helping a carpenter remove the partition between Boxes 7 and 8, had bored the hole in the door of Box 7, broken the locks on the doors and cut the notches in the plastered wall and corridor door. The proof completely failed to link Spangler to these sinister circumstances.

The Government's efforts to prove Spangler's associations with Booth and his conduct on the night of the assassination were, however, more successful. Twelve or more witnesses testified against Spangler. The most damaging of these was another of the stagehands, Jacob Ritterspaugh. Ritterspaugh said that he saw Booth running toward the rear door. He tried to stop him but Booth struck at him with his knife and got by him. He followed Booth across the stage to the alley and shouted for those ahead of him to stop Booth. As Ritterspaugh passed Spangler struck him in the mouth with the back of his hand and said, "For God's sake, shut up! Don't say which way he went." Ritterspaugh's testimony was considerably weakened by General Ewing's slashing cross-examination.

Three witnesses asserted that between nine and ten o'clock on the night of the murder they saw Booth ride up to the rear stage door and heard him call out Spangler's name three times.

Joseph Burroughs, a half-witted boy nicknamed "Peanuts," who worked around the theater, testified that between nine and ten o'clock he heard one of the stagehands shouting to Spangler that Booth wanted him. Shortly after that Spangler came out and asked the witness to hold Booth's horse, which

he did until Booth ran out of the theater after the shooting, took it from him and dashed away.

John F. Sleichman, property man at Ford's Theatre, declared that he saw Booth ride up to the rear stage door about nine o'clock, and heard him say to Spangler, who was at the door, "Ned, you will help me all you can, won't you?" Sleichman said Spangler answered, "Yes."

Charles Rosch, one of the provost marshal's detectives, told that he had gone to Spangler's boardinghouse shortly after the assassination and had searched his room. In a carpet bag he found an eighty-one foot length of rope.

To combat this testimony General Ewing called a number of witnesses in Spangler's behalf. Five witnesses testified that the rope which Rosch had produced was similar to a number of ropes used in the theater for moving scenery and props. It was also explained that this was the kind of rope crab fishermen used and that Spangler was an ardent crab fisherman.

H. Clay Ford, one of the proprietors of the theater, described the special preparations of the Presidential box and swore that all that Spangler had had to do with them was to help the carpenter remove the partition between the boxes.

Ritterspaugh, whose evidence had been most damaging to Spangler, was impeached by two witnesses. They testified that Ritterspaugh told them that Spangler slapped him in the face after he (Ritterspaugh) had shouted that the man running across the stage was Booth, and that what Spangler had said was, "Shut up! What do you know about it?"

Thomas J. Raybold, usher at the theater, testified that on March 7, before the murder, Henry E. Merrick, an employee of the National Hotel, and a party arrived with tickets for Box 8. When he ushered them to it, he found the door to the box locked. Because he was unable to find the key, he put his shoulder to the door and broke it open. Merrick corroborated Raybold's testimony.

Joseph T. K. Plant, a cabinetmaker and dealer in furniture, said that after the assassination he examined the keepers to

the locks on Boxes 7 and 8, and both locks appeared to have been forced. He added that he found the same condition in the door to Box 1 which was immediately below Box 8. His statements were corroborated by one of the theater employees who had noticed sometime before the murder that the lock on Box 8 had been "wrenched off."

G. W. Bunker, a clerk at the National Hotel, revealed that he opened Booth's trunk the day after the assassination and found an iron gimlet in it.

Other witnesses testified that Booth frequently attended performances at Ford's Theatre and on several occasions had occupied Box 7.

## The Case Against David Herold

Herold was a stupid oaf about twenty-three years of age. He was completely under Booth's domination. This lackey was valuable to Booth because he had intimate knowledge of the wild and largely roadless country which lay south of the Potomac.

Booth's plan for Herold was that he should join him, Atzerodt and Payne after their respective missions were accomplished, and guide them to the sanctuary they expected to find in Confederate territory. The plan misfired. Atzerodt and Payne were not at their appointed places, and Herold followed Booth on horseback across Navy Bridge to catch up with him on the other side of the river. He stayed with him, doing what Booth told him to do, until their flight ended at Garrett's barn. When Herold saw the barn was surrounded by soldiers and was about to be set on fire, he cried out that he wanted to surrender and gave himself up.

Herold's defense consisted of four witnesses. Three were physicians, who had known him since childhood. All of them testified that he was "light and trifling," was "more like a boy than a man," and could be "easily persuaded." One of the doctors said he possessed the mentality of a child of seven.

## The Case Against Lewis Payne

When Booth met Payne in Baltimore, probably in January 1865, the Confederate deserter was penniless, ragged and half starved. For a few dollars and some decent clothes he readily fell in with Booth's plans. Booth's role for Payne was that he should murder Secretary of State Seward. The deed was to be accomplished simultaneously with the assassination of Lincoln.

Secretary Seward was confined to his bed by injuries lately received by a fall from his horse. His jaw had been broken and the fractured ends had been fixed in place by an iron brace fastened to his head and shoulders.

Payne, by a ruse that he had some medicine from Seward's doctor which he had been commissioned to deliver to the Secretary personally, obtained entrance to the Seward house. The sick man's room was on the second floor. Payne got as far as the landing at the top of the stairway before he was met by the Secretary's son, Frederick, and told he could go no farther. Payne struck Frederick down with the butt of his pistol and rushed on. A nurse barred his way to the Secretary's room, but Payne forced him back by striking him in the head with a knife. Then Payne pressed on to the Secretary's bed and stabbed him three times. Major Seward, another of the Secretary's sons, and the nurse grappled with Payne and pulled him away from his intended victim. Payne fought back viciously; his dagger struck Major Seward and severely wounded him. As Payne dashed for the stairway, another attendant tried to stop him. Payne knocked him out of his way with his knife, and rushed down the stairs and out of the house shouting, "I am mad, I am mad." Outside he mounted his waiting horse and rode away.

For two days Payne must have wandered aimlessly about Washington. On Sunday night, disguised as a laborer, he appeared at Mrs. Surratt's door just as she and the members of her household were being arrested by the Federal officers.

Payne was arrested and taken to the War Department for questioning.

Secretary Seward had a stab wound in his right cheek and two in his neck, but they were not serious. The brace on his broken jaw had saved him from death. Frederick Seward's skull had been fractured. Major August Seward had several deep gashes on his head and hands. The nurse had a knife wound in his forehead. The attendant who had been the last to get in Payne's way had a stab wound three inches deep in his right side.

Payne's defense combined a plea of mental instability and justification for his action: He was a Confederate soldier, sincere in the conviction that his attempt to kill Seward was a justifiable act of war.

## The Case Against George A. Atzerodt

Atzerodt was a carriage painter by trade, but by all accounts a shiftless, crafty and mercenary character. He talked big but those who knew him best regarded him as a blowhard and a coward. At the time of the assassination he was thirty-three years old.

By his own admission, Booth had supplied him with arms and money, and he had enlisted in the kidnaping scheme. He said he balked at Booth's later plot to assassinate Lincoln, the Vice-President and the Secretary of State, but pretended to fall in with it because Booth threatened to kill him if he backed out.

Booth assigned Atzerodt the job of killing Vice-President Johnson; the murder was to take place on the evening of April 14 around ten o'clock.

Johnson lived at the Kirkwood House. Atzerodt ascertained the number of his room and, on the morning of the day of the assassination, rented the corresponding room on the floor above it.

Atzerodt brought a horse to a near-by livery stable in the

afternoon and said he would call for it around ten o'clock. At the appointed hour he showed up at the stable drunk. He seemed quite excited and told the stable attendant, "If this thing happens tonight you will hear of a promise." When the stableman said that his horse seemed skittish, Atzerodt replied, "She's good upon a retreat." Shortly afterward Atzerodt was seen entering the Kirkwood House. He stayed but a few minutes; then he came out and rode away.

Atzerodt wandered around Washington until between two and three o'clock Saturday morning, when he took a room at the Pennsylvania House and went to bed. Before six o'clock he left and made his way to the home of an acquaintance in Maryland, some twenty-two miles out of Washington.

Atzerodt's erratic actions had aroused the suspicions of people at the Kirkwood and Pennsylvania hotels and the livery stable. After the report of the assassination, these people immediately told the police and military authorities about his behavior. He was arrested on the Monday following the murder. When his room at the Kirkwood House was searched a loaded and capped revolver and ammunition for it were found underneath his bed pillow and a large bowie knife was found between the mattresses. A black coat was hanging on the wall. In the pockets were a bankbook of J. Wilkes Booth, showing a balance of $155 to his credit in a Montreal bank, a map of Virginia and three pocket handkerchiefs—one marked "Mary R. Booth," another "F. M. Nelson," and a third with a letter "H."

A long-bladed knife and sheath were picked up in a gutter near the Pennsylvania House. Atzerodt admitted they were his and that in his flight he had thrown them away. He also admitted that after the assassination he had pawned a revolver in Georgetown and got ten dollars for it.

There was no evidence that Atzerodt made any attempt to get into Vice-President Johnson's room on the night of the assassination or at any other time.

The only defense urged for Atzerodt was that he had been forced to play the part he had by Booth and was a notorious

coward, incapable of undertaking a dangerous mission. He had never, it was asserted, actually contemplated the murder of Johnson.

## The Case Against Dr. Samuel A. Mudd

The charge against Dr. Mudd was that with knowledge of the conspiracy he had harbored Booth, Herold, Payne, John Surratt, O'Laughlin and their confederates, had aided them in its execution and had helped them escape from justice after the murder of the President.

Louis J. Weichman testified that sometime about the middle of January 1865 while he and John Surratt were walking along a Washington public street they met Dr. Mudd. Surratt called Dr. Mudd by name and introduced him to Weichman. With Dr. Mudd there was a man whom the doctor introduced to Surratt and the witness as John Wilkes Booth. After the introductions, Weichman said, they went to Booth's hotel, the National House, where Booth, Surratt and Dr. Mudd left him and held a private conversation in Booth's room.

Marcus P. Norton, a lawyer from Troy, New York, and temporarily a guest at the National House, took the stand to say on March 3 Mudd walked into his room unannounced and, when he realized that he had mistaken the witness' room for another, apologized and said he was looking for Booth.

Three other witnesses testified they had seen Booth and Mudd together before the assassination.

Four of Mudd's former slaves recalled occasions on which the doctor had expressed gratification at news of Union defeats. They also said he had harbored Rebels at his place near Bryantown.

Three witnesses—two of them the doctor's former slaves—swore they had heard him bitterly denounce the President and say he ought to be killed. Daniel Thomas, a white man, swore that Mudd told him in March 1865 that the South would never be subjugated, and that the President, the cab-

inet and other Union men in Maryland would be killed inside of six weeks.

Two other former slaves of Mudd asserted they had seen John Surratt at the doctor's house in Bryantown and that the doctor had entertained him there.

William A. Evans, a minister who was also a detective, testified to an occasion early in March when he saw Dr. Mudd entering Mrs. Surratt's boardinghouse on H Street. As Mudd went in, said the witness, another man whom he knew as Jarboe came out. Jarboe was shaking hands with a young woman whom Evans thought was Anna Surratt.

The Government sought to corroborate Evans' testimony by calling Anna Surratt and Honora Fitzpatrick to the stand. Both girls stated positively, however, that they had never seen Dr. Mudd or Jarboe before the trial.

The most damning testimony against Dr. Mudd was given by the army officers who came to his house after the assassination to inquire about two men, one of them with an injured leg, who had come to his house and roused him from his sleep at two o'clock on Saturday morning April 15. These officers described their conversations with Dr. Mudd.

The first visitation was on Tuesday the eighteenth. Lieutenant Lovett and three troopers who accompanied him testified they asked Dr. Mudd if two men had called upon him in the early hours of the fifteenth. Mudd, apparently very nervous and embarrassed, had answered, "No." In response to their further questions, he finally admitted that two men had called and that one of them had a broken leg which he set. He said both men were strangers to him.

Lovett and his troop called again at Mudd's home on Friday the twenty-first, this time to place him under arrest. He then admitted that he knew Booth, but refused to identify him as the man whose broken leg he had set the week before. In a search of the house Mrs. Mudd produced a boot which the doctor said he had cut from the injured man's leg in order to set the fracture. Inside at the top of the boot was the name "J. Wilkes." When Mudd's attention was called to it,

he said he had never noticed the name. He adhered to his earlier statement that he did not know who the man was.

Colonel H. H. Wells, who was connected with the War Department office, testified to a number of interviews he had with Mudd after he had been arrested. Mudd, he said, finally conceded that the man he treated must have been Booth, but excused his failure to identify him by the fact that the man was disguised with a set of false whiskers and was "very much worn and debilitated."

Dr. Mudd presented an elaborate defense; over seventy witnesses appeared in his behalf. Many of these were called to impeach the Government's witnesses, particularly the former slaves and Thomas, Norton and Evans. From the record, the impeachment appears to have been complete.

A half dozen or more of Dr. Mudd's neighbors testified to the doctor's complete neutrality in the conflict between the North and South, and swore they had never heard him make any disloyal statements. These witnesses and others declared they had never seen Booth, John Surratt or any of the other defendants at Dr. Mudd's house.

Five witnesses took the stand to refute Weichman's testimony that the defendant introduced Booth to him and John Surratt. From their intimate knowledge of Dr. Mudd's whereabouts they asserted that the doctor was at his home in Bryantown continuously from December 24, 1864, to March 22, 1865. On two occasions he was in Washington—December 23 and March 23. A number of witnesses accounted for his movements during all the time he was there—and swore that at no time did he visit the National House or encounter either Booth, Surratt or Weichman.

James J. Jarboe gave a direct denial to Evans' testimony by stating that at no time during March of 1865 had he been at the Surratt home and encountered Dr. Mudd. He testified further that he was not in Washington at the time of the alleged occurrence.

Dr. George D. Mudd, a second cousin of the defendant, testified that he learned of the assassination on Saturday night,

and talked to Lieutenant Dana, one of the Lovett searching party, about it. On Sunday he met Dr. Samuel Mudd at church and they discussed the news of the assassination. At that time, he said, the defendant told him of the visit of the two men to his house on Saturday morning, and commissioned him to report the facts, as he had told them, to the authorities. On Tuesday, the witness said, he got in touch with Lieutenant Lovett and told him the full story as the defendant had told it to him. He then accompanied Lovett and his troopers to Dr. Samuel Mudd's home. Although he was not present at the officers' interrogation of his cousin, he left the house with them when it was finished. None of them said anything about the defendant's having denied that the two men had been to his house.

In rebuttal the Government called John F. Hardy, a neighbor of Mudd. He testified that when he talked to the defendant on Saturday evening, the day after the murder, a man named Boyle was mentioned as the reported assailant of Secretary Seward and Booth as the probable slayer of Lincoln. At that time, according to the witness, Dr. Mudd had said nothing about his early-morning visitors.

## The Cases Against Michael O'Laughlin and Samuel Arnold

There was no question that O'Laughlin and Arnold had had intimate associations with Booth which continued until at least the last days of March. The three had been schoolmates in their boyhood days in Baltimore. O'Laughlin and Arnold had served in the Confederate Army and both had undoubtedly been enlisted by Booth in the kidnaping enterprise.

There was evidence that Arnold became disgusted with Booth because he had delayed the kidnaping until it was publicly rumored that such a plot was afoot. Then he declared in a letter to Booth that he would have no more to do with it "for the present."

Arnold, in defense, called a number of witnesses whose pieced-together testimony accounted for all of his time and

whereabouts from March 21 to April 17. At no time during that period, so swore his witnesses, was he in Washington.

The Government's charge against O'Laughlin was that he had "lain in wait" with the unlawful intent to murder General Grant. Three witnesses—Secretary Stanton's son, David, Major Kilburn Knox and an army sergeant named Hatter—declared that on the evening of April 13 there were a serenade and celebration at the Stanton home in honor of the Secretary and General Grant. The general was present throughout the celebration. Between nine and ten in the evening a strange man had appeared just outside the Stanton house. David Stanton and Major Knox testified that he asked to see Secretary Stanton; said he was a lawyer and an old friend of his. They told him he could not see the Secretary and asked him to leave the premises. Without protest, he moved away. Hatter testified that some time later the man accosted him and said that he wanted to see General Grant. Hatter told him it was hardly the occasion to see the general and the man mumbled something to himself and left the grounds. This man, said all three witnesses, was O'Laughlin.

O'Laughlin had been arrested at Baltimore the Monday following the assassination. He had been in Washington April 13, 14, 15 and 16, having come there for a drinking spree with three companions, one of them an ensign in the United States Navy. By their combined testimony, corroborated in parts by three others, these companions of O'Laughlin accounted for every moment of his time from three o'clock in the afternoon of the thirteenth until he returned with them to Baltimore at eleven-thirty Saturday morning. At no time, they said, was O'Laughlin anywhere near the Stanton residence.

## The Case Against Mary Eugenia Surratt

The specific charges against Mrs. Surratt were that she had received, entertained, harbored, and concealed, aided and abetted Booth and the other defendants and their confederates, and with knowledge of their conspiracy had aided and

abetted them in its execution and their escape from justice.

In its direct case the Government called nine witnesses to testify against Mrs. Surratt. Only two of them—Weichman, her erstwhile boarder, and John M. Lloyd, her tenant at Surrattsville, gave testimony which connected her with the alleged conspiracy.

Weichman described his acquaintance with John Surratt—they had met in 1859 when they were classmates at St. Charles College in Maryland and had been friends ever since. Weichman also told of his having boarded in Mrs. Surratt's home on H Street from the first of the preceding November until the time of the assassination.

Weichman said that after January 15, 1865, when he and John Surratt first met Booth and Dr. Mudd, Booth was a frequent caller at the Surratt boardinghouse. When he came he asked for John Surratt and, if John wasn't there, for Mrs. Surratt. Weichman added that Booth often had long private conversations with both John and Mrs. Surratt.

On April 2, Weichman said he had gone at Mrs. Surratt's request to Booth's room in the National Hotel and told him that Mrs. Surratt wanted to see him that evening on some private business. Booth came to the boardinghouse that same evening. Then Weichman added a detail—in Booth's room he had met and been introduced to the celebrated tragedian, John McCullough.

On the Tuesday previous to the assassination Mrs. Surratt sent him again to the National Hotel to see Booth, this time to ask him for the loan of his buggy so that she could drive to Surrattsville to see Mr. Nothey about the money he owed her. Booth replied that he had sold his buggy, but gave him ten dollars and told him to hire one. (On cross-examination Weichman admitted that he did not tell Mrs. Surratt that Booth had given him the ten dollars.) On the way to Surrattsville they passed John Lloyd and Mrs. Offutt driving toward Washington, and Lloyd and Mrs. Surratt held a whispered conversation which Weichman said he did not hear. Weichman said he did not see Nothey at Surrattsville, but the

bartender at the tavern told him that Nothey was in the parlor. Mrs. Surratt went into the parlor and presumably transacted her business with him while Weichman waited outside.

About 7:30 on the morning of the fourteenth, the day of the assassination, Mrs. Surratt told Weichman she had received a letter from Charles Calvert about the money Nothey owed her and was obliged to make another trip to Surrattsville. Weichman offered to drive her there and she gave him ten dollars to hire a buggy from Howard's livery stable. They arrived at Lloyd's tavern about 4:00. Mrs. Surratt went into the parlor, and Weichman went to the barroom. John Lloyd drove up just as they were about to leave and helped with a minor repair to the buggy. If there was any conversation between Mrs. Surratt and Lloyd, Weichman said, he did not hear it.

Weichman testified that just before he left Washington for Surrattsville on the fourteenth he saw Booth talking to Mrs. Surratt in Mrs. Surratt's parlor. No one else was present. When they started Mrs. Surratt had two packages with her; one, he understood, contained legal papers concerning her property, and the other was a package about six inches in diameter which "looked like two or three saucers wrapped up."

The prosecution produced the original of a telegram. Weichman said it was a copy of one he had received on March 23. It was dated on that day and addressed to him at Mrs. Surratt's. It read: "Tell John to telegraph number and street at once," and was signed "J. Booth." Weichman said he immediately delivered the message to John Surratt. He identified the handwriting on the original of the message as Booth's.

Weichman stated that on April 3 John Surratt returned to Washington from one of his out-of-town trips, and told him he had been in Richmond. There he had seen and talked to Jefferson Davis and Judah P. Benjamin, then the Confederate Secretary of State, and they had told him that Richmond would not be evacuated. John left Washington the same evening, saying he was going to Montreal. He displayed a con-

siderable sum of money--about $200 in gold and $50 in greenbacks. Weichman said he had not seen Surratt since.

On the day of the assassination, Weichman said, Mrs. Surratt showed him a letter from John Surratt dated "St. Lawrence Hall, Montreal, April 12."

Weichman testified that when he was at Howard's livery stable on the fourteenth, arranging for the hiring of a buggy for Mrs. Surratt, he met Atzerodt who said he was there to hire a horse.

Weichman knew it was Atzerodt because he had seen him once before at Mrs. Surratt's house. He did not fix the date. At that time Atzerodt had asked to see John Surratt, but John was somewhere in the country and did not come home until late in the evening. Atzerodt spent the night in the boardinghouse and left the next morning. Weichman admitted he had heard Mrs. Surratt tell Anna that they did not care to have Atzerodt live in the house, but he added that Atzerodt called there afterward "ten or fifteen times."

On March 19 Weichman went with John Surratt to the Herndon House, where John Surratt engaged a room. Atzerodt afterward told him that Payne was occupying the room.

Weichman swore that some time in March a man claiming to be a Baptist preacher named Wood came to the boardinghouse and asked for John Surratt. John was not there and the man then asked for Mrs. Surratt. He had no baggage, but remained for the night. Three weeks later the same man called again. Weichman again answered the door and was surprised when this time the man gave his name as Payne. Weichman identified Payne, one of the prisoners in the dock, as the man he had seen. The second time Payne appeared, he carried some light baggage and stayed at the house for three days. Mrs. Surratt and her family, Weichman said, were devout Catholics and there was considerable talk among Mrs. Surratt and the young ladies in the house, Anna Surratt and Honora Fitzpatrick, as to why a Baptist preacher should have sought a room in Mrs. Surratt's boardinghouse.

Weichman said that during Payne's stay he found a false

mustache, which Payne afterward inquired about. For some unexplained reason Weichman kept the mustache.

Weichman also said that on one of the days Payne was there he went into Payne's room unexpectedly, and found him with John Surratt. Spread out on the bed were bowie knives, two revolvers and four sets of new spurs.

Weichman mentioned another occurrence which took place during Payne's second visit to the boardinghouse. It had quite the air of melodrama. About six in the evening John Surratt came home "terribly excited" and "flourishing a revolver." As he went toward his room he cried out, "I will shoot anyone who comes into this room. My prospects are gone. My hopes are blighted. I want to get something to do." Before he reached his room, Payne came in. He too was greatly disturbed and brandished a pistol. Five minutes later Booth came in. "Booth was so excited he walked around the rooms three or four times very frantically." He had a whip in his hand and was striking his boots with it. The three of them, Booth, Surratt and Payne, went upstairs. Half an hour later they came downstairs and left the house together. Later that evening John Surratt told Weichman that Booth had gone to New York and Payne to Baltimore.

Weichman testified that he saw David Herold at the tavern in Surrattsville some time in the summer of 1863 while Mrs. Surratt was still managing it. Herold was with a band of musicians which had stopped there to serenade the occupants of the tavern. He swore also that he saw Herold a second time—he was not sure of the date—at Mrs. Surratt's house in Washington. He had never, he said, seen Arnold or O'Laughlin at any time before he appeared in court. On two or three occasions Gus Howell, who he understood was a Confederate blockade-runner, had stopped at the boardinghouse.

Weichman had much to say about Mrs. Slater. He said he met her at the boardinghouse early in March when she stayed there overnight. Mrs. Surratt told him she was a dispatch runner. About three weeks before the murder, he saw her again. This time she and Mrs. Surratt were leaving the board-

inghouse in a buggy driven by John Surratt. When Weichman asked where they were going either Mrs. Surratt or John said, "out into the country." Later Mrs. Surratt told him that Mrs. Slater was to have met Howell, but Howell had been captured and John had taken Mrs. Slater back to Richmond.

Weichman said that some time after March 19 he told Captain Gleason, one of his superiors in the office where he worked, of some of "the things that were going on in the Surratt boardinghouse." He told Gleason that Booth, who was a loud talking "secesh sympathizer" was a frequent visitor and that Howell, with whom John Surratt had a contact, was a Confederate blockade-runner. He also, he said, spoke to Captain Gleason about an article which had appeared in the New York *Tribune* on March 19 which told of a rumored plot to kidnap President Lincoln, and reported to his superior snatches of conversation he had overheard among Booth and John Surratt and Payne and Atzerodt, which hinted at such a plot. He asked Gleason if he thought anyone would attempt such a thing. Gleason, he said, laughed at the idea.

Mrs. Surratt's attorneys subjected Weichman to a long and detailed cross-examination. Aside from some minor contradictions, about the only new evidence elicited was that Mrs. Surratt was a kindly, hospitable woman and a regular attendant at Mass.

When pressed for his reasons for testifying against Mrs. Surratt, whom he admitted "had treated him like a son," Weichman replied that it was a hard thing for him to do, but his duty to his Government outweighed sentimental considerations. He stated that the aid he had given the Government since the assassination had been entirely voluntary, uninfluenced either by threats or promises.

John M. Lloyd next took the stand. He swore that some six weeks before the assassination John Surratt, Herold and Atzerodt had come to his house and asked him to secrete for them two carbines with ammunition, a monkey wrench and a sixteen-foot length of rope. Surratt instructed him that they would be called for in a few days.

Lloyd testified also that on Tuesday before the assassination he met Mrs. Surratt on the road to Uniontown. She hinted vaguely at some articles which he had at his place, and when he did not seem to understand, he said "she came out plain and asked me about the 'shooting irons.'" Lloyd told her they were "hid away far back" because he was afraid his house would be searched. She told him to have them ready, because they would be wanted soon.

Lloyd added that when he arrived home about five o'clock on the evening of the fourteenth he found Mrs. Surratt there. She met him in the yard by the woodpile and told him to have the "shooting irons" ready that night, that "those things" would be called for then. She also, said Lloyd, gave him a small paper-wrapped package, and said that too would be called for later in the evening. He swore on direct examination that he immediately took the package upstairs and opened it. Inside he found a pair of field glasses.

About midnight, Lloyd testified, Herold came into the tavern. Very excitedly he said, "Lloyd, for God's sake, make haste and get those things." Lloyd left the room and came back shortly with the carbines, the ammunition, the wrench, the rope and the field glasses. Herold took only one of the carbines and went out. Lloyd followed him. Outside, he said, were two horses, and a man whom he did not recognize was sitting on one of them. Herold mounted the other and the two rode away. As they rode off, so testified Lloyd, Herold called, "I'll tell you some news. . . . I am pretty certain we have assassinated the President and Secretary Seward."

Lloyd's cross-examination, while not so skillfully conducted as it might have been, should have demonstrated to any set of impartial judges his utter worthlessness as a witness. He quickly abandoned his story that immediately after Mrs. Surratt had given him the package he went upstairs and opened it. He said he must be mistaken about that—he might have put it on the safe in the dining room. In fact, now that he considered it, that was his best impression.

He was equally uncertain concerning the conversations

with Mrs. Surratt about the "shooting irons." First he was "quite positive," then "not altogether positive" and finally, "not so positive of the first occasion as he was of the last." All of this uncertainty Lloyd blandly excused by the admission that he was confused and his memory indistinct "because he had been in liquor."

Lloyd was sure that Mrs. Offutt was in the yard with him during his conversation with Mrs. Surratt, but he was not certain she was close enough to have heard any part of it. He was positive that it was to him and not to Mrs. Offutt that Mrs. Surratt had given the package.

Mrs. Emma Offutt was called to state her recollection of the meetings with Mrs. Surratt. She said that on April 11 she was riding in a buggy with her brother-in-law; when they were near Uniontown they passed Mrs. Surratt and Weichman driving toward Surrattsville. She said Lloyd got out of his buggy and went over to Mrs. Surratt's buggy to talk to her, but she did not hear what was said. She saw Mrs. Surratt again on the fourteenth. As she was about to leave, Lloyd drove up and he and Mrs. Surratt talked together. Again she was too far away to hear any part of their conversation.

Under cross-examination Mrs. Offutt admitted conversing with Mrs. Surratt in the tavern parlor before Lloyd came home, but she persistently denied that Mrs. Surratt gave her a package or message for Lloyd.

Major H. W. Smith, who led the party which arrested Mrs. Surratt on the night of the sixteenth, told how Payne was discovered at the front door as they were about to leave. He said he asked Payne what business he had at the house at that time of night, and Payne answered that he had come there at Mrs. Surratt's request to dig out a gutter. Smith then related that he had confronted Mrs. Surratt with Payne, and that she had denied ever seeing him before. When she made that denial, added Smith, she was less than three paces away from Payne and had a full view of him.

Major Smith's testimony was corroborated by two other officers. These also said that after the arrest they searched the

boardinghouse and found photographic cards—in the record they are called *cartes-de-visite*—of Jefferson Davis, Alexander H. Stephens (Vice-President of the Confederate States of America), Confederate General Beauregard and Union General McClellan. There was also a card showing two crossed Confederate flags with the arms of the State of Virginia; underneath the design were printed letters: "Thus v.ll it ever be with tyrants. Virginia the Mighty. *Sic Semper Tyrannis.*"

In Mrs. Surratt's bedroom these officers found a bullet mold, some percussion caps and a photo of John Wilkes Booth. The latter had been hidden and sealed in the back of a framed picture which bore on its face the title, "Morning, Noon and Night."

To refute this testimony the defense counsel called twenty-five witnesses in Mrs. Surratt's behalf. Nine—five of them Catholic clergymen—asserted that Mrs. Surratt was a good Christian woman of exemplary character and that they had never heard her voice any disloyal utterances. Five others, all intimately acquainted with Mrs. Surratt, testified that her eyesight was so bad that she could not see to read or sew by gaslight and frequently failed to recognize her close friends when she passed them on the street.

Because the name of Mrs. Surratt's brother, Zad Jenkins, had been frequently brought into the testimony and his loyalty to the Union impugned by the Government's witnesses, seven people took the stand to swear that all through the war Jenkins had been an outspoken loyalist.

Six witnesses, including Mrs. Offutt, testified that Lloyd was a habitual drunkard, and was very drunk when he arrived at Surrattsville on the night of the fourteenth.

A statement of the actor John McCullough, sworn to before the American Consul at Montreal, was offered in evidence. In it McCullough declared that he had not been in Washington on April 2 and, in fact, had not been there since March 26. He had no recollection of ever having met a person by the name of Weichman.

George Cottingham, a special Federal officer in the detail

that arrested Lloyd shortly after the assassination, testified that for two days thereafter Lloyd was in a state of hysterical terror. At first Lloyd had denied all knowledge of the assassination and had protested he had never seen or talked to Booth or Herold. Only later had he changed to the story he repeated on the witness stand. Cottingham said Lloyd explained the switch in his story by saying he was at first afraid "they" (unidentified) would kill him.

The defense brought forward several people who supported Mrs. Surratt's statement that business had taken her to Surrattsville. B. F. Gwynn, who resided near Surrattsville and knew Mrs. Surratt, said he saw her at the tavern on the afternoon of the assassination and that she gave him a letter which, at her request, he delivered to John Nothey.

John Nothey corroborated Gwynn and added that he owed Mrs. Surratt for seventy-five acres of land that he had purchased from John H. Surratt, Sr. before his death. Mrs. Surratt, he said, was pressing him for payment and threatening foreclosure. He had talked to her about it on the Tuesday before. He did not see her on the fourteenth.

J. Z. (Zad) Jenkins, Mrs. Surratt's brother, testified that he was at Surrattsville on the afternoon of the fourteenth when Weichman and his sister drove up to the tavern and that Mrs. Surratt showed him the letter which she had received from Charles Calvert.

Anna Surratt was brought from old Capitol Prison, where she was still confined, to testify in her mother's behalf. She said Atzerodt had stayed in her mother's house only one night, but had afterward called there frequently. Whenever he called he asked for Weichman. Payne, she said, first came to her house some time around Christmas. He came again some weeks afterward. She knew him only by the name "Wood."

Miss Surratt said the picture, "Morning, Noon and Night," belonged to her. She and her friend, Miss Fitzpatrick, had seen some of Booth's pictures in a daguerreotype gallery and they had each bought one. Her brother told her to destroy

it, but instead she hid it in back of the "Morning, Noon and Night" picture. Anna also acknowledged ownership of the Davis, Stephens and Beauregard picture cards and said the pictures of Union Generals McClellan, Grant and Hooker were also hers. She prized them, she said, because they had belonged to her father.

She testified she had not seen her brother, John, since April 3. She admitted he had been friendly with Booth, but added that on one occasion her brother had told her he thought Booth was crazy and wished he would attend to his own business. She had never, she said, "heard a word breathed" of any plot to kidnap or kill the President. She had never seen Jarboe, Dr. Mudd, or any of the defendants other than Atzerodt and Payne, at her mother's house.

Mrs. Elizabeth Holohan, who boarded with Mrs. Surratt from February 7 until she was arrested on April 16, recalled seeing Payne and Atzerodt at the house. Payne had been there twice—once in February and once in March. He was introduced to her as Wood, and she never knew him by any other name. She had seen Atzerodt once or twice. The women called him "Port Tobacco." Booth, she said, had called at the house a number of times. When he called, he asked for John and, if John was not there, for Mrs. Surratt.

Augustus Howell, the alleged blockade-runner, took the stand. He admitted he had served in the Confederate First Maryland Artillery from the outbreak of the war until June 1862. Since that time, he said, he had had no "particular occupation but had been at Richmond a half-dozen times." He had known the Surratts for a long time and had once stayed at Mrs. Surratt's boardinghouse in Washington because it was cheaper than going to a hotel. On cross-examination he admitted he knew Mrs. Slater and had gone to Richmond with her and John Surratt sometime in February 1865. He said he had become quite intimate with Weichman. Weichman told him he would like to settle in the South, that his sympathies were with the South and that he thought that ultimately the South would win.

The Government called fifteen witnesses in rebuttal. Four of them testified that Weichman bore a reputation as a good Union man. Officer John T. McDevitt said Weichman had been very zealous in aiding the Government and had gone with him to Canada to aid in the search for John Surratt. On this trip, said the witness, Weichman had ample opportunity to escape had he wanted to.

Five other people declared that Zad Jenkins was a Confederate sympathizer.

John T. Holohan's statements agreed largely with those his wife had made in Mrs. Surratt's defense. He said he had seen Atzerodt at the Surratt home several times, but did not know him by that name. He had also seen Payne there once at breakfast, but thought his name was Wood. Booth, he said, was a frequent visitor and often visited Mrs. Surratt and the young ladies in the parlor for long periods of time. He had never, he said, heard any "political conversation" at Mrs. Surratt's and had never heard of a plot to kidnap or murder the President. On only one point did his testimony injure Mrs. Surratt. He was not aware, he said, that her eyesight was bad, and he had never heard the subject referred to by any member of her household.

E. L. Smoot, who lived near Surrattsville, said Nott, the tavern bartender, had spoken "against the Government" and "denounce[d] the administration in every manner and form." After the assassination Smoot asked Nott whether he knew John Surratt. Nott replied that he "reasoned he was in New York," and added, "John knows all about the murder. Do you suppose he is going to stay in Washington and let them catch him? . . . I could have told you this thing was coming to pass six months ago."

The last witness was called and heard on June 16 and the record of evidence was officially declared closed. That record, as prepared by Pittman, the official reporter, discloses a number of unique circumstances.

None of the defendants was permitted to take the stand in his own defense.

The witnesses, as they testified, faced the judges and the prosecutors. Under cross-examination they had their backs to defense counsel and, whenever they turned to answer their questioners, were sharply reprimanded by the presiding judge and told to face the court.

Except where it might have aided the defendants, there was no ban on hearsay testimony.

Every objection made by the Prosecuting Judge Advocate to questions asked or testimony offered by the defense was sustained. Every objection made by defense counsel on behalf of their clients was overruled.

## The Summations

Attorneys Doster, Ewing, Stone and Cox summed up in turn for their respective clients.

Despite the accumulated mass of incriminating evidence against his clients, Mr. Doster argued brilliantly for the lives of Payne—"the misguided Confederate patriot"—and Atzerodt—"the coward who only pretended to fall in with Booth's plot, but had never intended or tried to kill Johnson." Though unsuccessful, these summations deserve to rank among the masterpieces of forensic oratory.

General Ewing's painstaking and exhaustive analysis of the evidence against Dr. Mudd and Spangler revealed the weaknesses and contradictions in the Government's cases against them. While his arguments may have lacked the pyrotechnics of some of the other summations, they did succeed in saving his clients from the gallows.

On behalf of O'Laughlin and Arnold Mr. Cox argued that while there was proof of their concert with Booth in the abortive kidnaping plot, there was an utter lack of proof of their participation in Booth's later plan of wholesale murder. The law, declared Cox, read clearly that even if these men had entered into a conspiracy to kidnap the President, if they had wholly withdrawn from that conspiracy and it was never consummated, they could not be charged with criminal re-

sponsibility for the consequences of another and entirely different conspiracy perpetrated without their knowledge by their former associates.

Mr. Stone did as much as anyone could have done for the defendant Herold. The facts of Herold's associations with Booth and his efforts to aid him in his escape were uncontradicted. Mr. Stone made the most of the evidence in extenuation: Herold was a mental defective who had been led into an intimacy and conspiracy by the fascinating, persuasive and dominating Booth.

Mr. Clampitt opened the summations for Mrs. Surratt by reading Reverdy Johnson's carefully prepared brief and argument attacking the jurisdiction of the military tribunal. To a court made up of unprejudiced judges who had been trained in the law, the argument would have been wholly persuasive. The tribunal trying Mrs. Surratt and her codefendants listened to it with ill-concealed boredom and impatience.

In his brief Judge Johnson specifically disavowed any intention of analyzing or arguing the evidence. But he said he could not forbear a single statement of the obvious:

As you have discovered, I have not remarked on the evidence in the case of Mrs. Surratt, nor is it my purpose; but it is proper that I refer to her case, in particular, for a single moment. That a woman, well educated and, as far as we can judge from all of her past life as we have it in evidence, a devout Christian, ever kind, affectionate and charitable, with no motive disclosed to us that could have caused a total change in her very nature, could have participated in the crimes in question is almost impossible to believe. Such a belief can only be forced upon a reasonable, unsuspecting and unprejudiced mind by direct and uncontradicted evidence, coming from pure and perfectly unsuspected sources. Have we these? Is the evidence uncontradicted? Are the two witnesses, Weichman and Lloyd, unsuspected? Of the particulars of their evidence I say nothing. They will be brought before you by my associates. But this conclusion in regard to these witnesses must be in the minds of the court, and is certainly

strongly impressed upon my own, that, if the facts which they themselves state as to their connection and intimacy with Booth and Payne are true, their knowledge of the purpose to commit the crimes and their participation in them, is much more satisfactorily established than the alleged knowledge and participation of Mrs. Surratt.

When Mr. Clampitt had finished reading Judge Johnson's argument, Mr. Aiken followed with an analysis of the evidence against Mrs. Surratt. In an effort to induce the tribunal to accord his client the protection afforded by Anglo-Saxon law to even the meanest individual accused of crime, he cited standard authorities that "courts-martial are bound, in general, to observe the rules of the law of evidence by which the courts of criminal jurisdiction are governed." From this premise he argued strenuously that Mrs. Surratt was to be presumed innocent in a military court as she would have been in a civil court, unless the Government could establish her guilt beyond a reasonable doubt.

Mr. Aiken posed this specific question: Did the "few detached facts and circumstances lying around the outer circle of the alleged conspiracy" prove that Mrs. Surratt had guilty knowledge of the conspiracy, and a guilty intent to aid in its execution?

There were, declared Aiken, only three such circumstances: (1) She was the mother of John Surratt and within the last three months had met Booth, Payne and Atzerodt; (2) She denied, when arrested, that she had ever seen Payne before; and (3) She had, allegedly, told Lloyd to have the "shooting irons" ready. The photographs Aiken dismissed as having been completely explained by Anna Surratt's testimony and as too trivial to merit discussion.

There was no evidence, said the advocate, even from Weichman, that Mrs. Surratt had ever discussed the kidnaping or assassination of the President or made plans with her son, Booth, Payne, Atzerodt or anyone else to aid such conspiracies.

Payne, said Mr. Aiken, had been to Mrs. Surratt's house on but two occasions—the first time for a night, the second time

for three days. He had called himself "Wood." He was well dressed, and represented himself as a Baptist preacher. If he had excited Weichman's suspicions because of the incident of the false mustache, Weichman, by his own admission, had not communicated that suspicion to Mrs. Surratt or any member of her household. When, under the emotional strain of her arrest, she had been confronted in the darkened hallway with the dirty, disheveled creature with a pickax, she could hardly have been expected to identify him with the clean and well-groomed person she had known as a minister of the Gospel. Five witnesses had testified that her eyesight was failing, and that she had difficulty in recognizing close friends even in the daylight.

The only testimony, said Aiken, that Mrs. Surratt mentioned the "shooting irons" to John Lloyd came from Lloyd himself. He quoted from the shorthand transcript of the testimony Lloyd's admission that he was so drunk on the night in question that he could not be certain of anything. The vagueness and contradictions in his testimony as to his alleged conversations with Mrs. Surratt about the "shooting-irons" discussion made it inconceivable that the tribunal would give his evidence any credence.

Was there ever, demanded Aiken, a situation which so clearly demanded the rejection of testimony as falling short of proof beyond a reasonable doubt?

Strange it was too, pursued Aiken, that Weichman, whose inquisitiveness and sharp ears had brought him so much information and who had been with Mrs. Surratt on both occasions when she had talked to Lloyd, had heard nothing concerning "shooting irons."

All of the testimony against Mrs. Surratt, said Aiken, came from Weichman and Lloyd. Weichman, the ingrate, whom Mrs. Surratt had treated as a son, and whose own admissions branded him as a conspirator. What additional proof, asked the advocate, could the Court desire of the confidential relations between Weichman and Booth than the telegram Booth had sent to Weichman on March 23, asking him to relay his

cryptic message to John Surratt? That, said Aiken, was a stronger circumstance to indicate a guilty knowledge of the conspiracy than anything that had been produced against Mrs. Surratt. Yet here was Weichman, vouched for by the Government and presented as the chief witness against Mrs. Surratt.

And what about Lloyd? demanded Aiken. Lloyd, "the admitted drunken sot and coward," who was "in a state of maudlin terror when arrested," and who denied for two days all knowledge of Booth and Herold. Only when coerced by threats and fears of hanging did Lloyd confess his criminal associations with Booth and Herold and seek "in a weak and common effort" to exculpate himself by shifting his crime onto Mrs. Surratt.

These two, said Aiken—Weichman and Lloyd—were the Government's sole reliance for its demand that Mrs. Surratt be convicted and branded as one of the murderers of Abraham Lincoln. Aiken's conclusion was impassioned and stirring:

> No one has been found who could declare any appearance of the nursing or mysteriously discussing of anything like conspiracy within the walls of Mrs. Surratt's house. Even if the son of Mrs. Surratt, from the significancies of associations, is to be classed with the conspirators, if such body existed, it is monstrous to suppose that the son would weave a net of circumstantial evidence around the dwelling of his widowed mother, were he ever so reckless and sin-determined; and that they [the mother and son] joined hands in such a dreadful pact is more monstrous still to be thought.
>
> A mother and son associates in crime! And such a crime as this half of the civilized world never saw matched in all its dreadful bearings! Our judgments can have hardly recovered unprejudiced poise since the shock of the late horrors if we can contemplate with credulity such a picture, conjured by the unjust spirits of indiscriminate accusation and revenge.

It was a powerful plea.

The final summation, that for the Government's case, was made by Judge Advocate Bingham. He spoke for the better

part of two days. More than half his argument was devoted to answering Reverdy Johnson's contentions that the tribunal was without jurisdiction to try the defendants. The emphasis laid on this question by Colonel Bingham was obviously prompted by persistent public controversy over the point rather than by any apprehension that it was necessary to convince the members of the commission of their authority.

Then the prosecutor rehearsed briefly the law of conspiracy: "If it appears that two persons by their acts are pursuing a common object . . . a conclusion is warranted that there is a conspiracy"; "If a conspiracy is formed, and a person joins it afterward, he is equally guilty with the original conspirators"; "Evidence of the acts and declarations of any one of the conspirators, said or done in furtherance of the common design, is evidence against all of the others—all are guilty as principals."

Colonel Bingham next discussed the evidence offered in support of the charge that Jefferson Davis and other Confederate officials and agents had participated in the alleged conspiracy to murder President Lincoln, Vice-President Johnson, Secretary of State Seward and General Grant. The evidence was weak and uncertain, but the prosecutor labored it and declared that the fugitive John Surratt was the link which connected these "traitors to the Union" with the murderers at the bar.

Then Colonel Bingham took up in order the evidence against Dr. Mudd, O'Laughlin, Arnold, Atzerodt, Payne, Herold, Spangler and Mrs. Surratt. His particular argument for Mrs. Surratt's conviction consumed less than twenty minutes. He began with the statement:

It is almost imposing upon the patience of the court to consume time in demonstrating the fact, which none conversant with the testimony in this case can for a moment doubt, that John H. Surratt and Mrs. Mary E. Surratt were as surely in the conspiracy to murder the President as was John Wilkes Booth himself.

The testimony he catalogued to support this conclusion concerned chiefly John Surratt and his allegedly intimate relations with Booth, Payne, Atzerodt and Herold, his trips to Richmond and Canada and his associations there with the leaders of the rebellion.

The guilt of Mrs. Surratt, said Bingham, was shown by many facts. (1) Her house was the "headquarters" of Booth, John Surratt, Atzerodt, Payne and Herold; Booth, Atzerodt and Payne inquired for her; and she had numerous long conversations with Booth. (2) A picture of Jefferson Davis was found in her room. (3) She sent to Booth for a carriage to take her to Surrattsville on April 11 "for the purpose of perfecting arrangements deemed necessary for the successful execution of the conspiracy, and especially to facilitate and protect the conspirators in their escape from justice"; Booth on that occasion had given her ten dollars with which to hire the conveyance; and Mrs. Surratt had pretended to go to Surrattsville to transact her private business. (4) On April 11 she had met John Lloyd and told him to have the "shooting irons" ready. (5) On April 14 she had again gone to Surrattsville, had seen Lloyd and repeated her statement about the "shooting irons" and handed him a package which she said Booth had asked her to deliver to him and hold until it would be called for. (6) On the night of her arrest she denied knowing Payne—Payne, who had lodged four days in her house, who had sat at her table and conversed with her, and who, "when the guilt of his great crime was upon him and he knew not where else he could so safely go to find a coconspirator," found his way to the door of Mrs. Surratt. This last fact, Bingham asserted, put "forever at rest the question of the guilty participation of the prisoner in the conspiracy and murder."

Bingham wholly ignored the testimony which showed that Weichman had not told Mrs. Surratt Booth had given him ten dollars for the buggy's hire. He did not mention that Payne was disguised when he appeared at Mrs. Surratt's door nor that the hallway was dimly lighted nor that Mrs. Surratt's

eyesight was bad. In fact, despite contrary evidence, he declared that the hall was "brilliantly lighted."

Lloyd was defended by Bingham as a poor weakling, forced by fear that his life was in danger to conceal the weapons Booth left with him and to keep the fact secret. Nonetheless, he was a credible witness whose testimony the commission should accept.

Weichman, Bingham declared, was a "patriot" who put love of his country above all else and told the bitter truth to aid the Government in bringing Lincoln's murderers to justice.

On June 28 the summations were completed and the judges retired to consider the evidence. Pursuant to the court-martial practice then usual, the three prosecuting judge advocates sat with them. After two days of secret deliberations, the court returned its verdict: all of the defendants were found guilty; Herold, Atzerodt, Payne and Mrs. Surratt were condemned to death; Dr. Mudd, O'Laughlin and Arnold were sentenced to life imprisonment. Spangler was given a prison sentence of six years.

On July 5, 1865, President Johnson wrote out in his own hand and signed the order officially approving the sentence. The executions of Herold, Atzerodt, Payne and Mrs. Surratt were to be carried out by the proper military authorities under the direction of the Secretary of War on July 7, 1865, between the hours of ten in the morning and two in the afternoon. Dr. Mudd, Arnold, O'Laughlin and Spangler were ordered confined in the penitentiary at Albany, New York.

In the forty-eight hours which were left Mrs. Surratt's few friends made frantic efforts to save her. Petitions asking that her sentence be commuted to life imprisonment were hurriedly circulated and signed by hundreds of prominent citizens. These petitions were sent to the President but never reached him. Johnson had issued orders that he would see no one seeking mercy for any of the condemned.

There was at least one appeal which should have broken through the barrier. This was a sworn statement by John S.

Brophy, a former professor at Gonzaga College. It was handed to Judge Advocate General Holt a few hours before the execution. In it Brophy declared that he knew Weichman well and that Weichman had asked him to be one of his character witnesses at the trial. When Brophy refused, because he knew Weichman to be an avowed secessionist, Weichman had urged him to leave the courtroom lest he be called as a witness for the defense. Weichman, so swore Brophy, had declared to him that Mrs. Surratt was innocent. Weichman had testified as he had because Gleason had informed on him; he lied to save his life.

Early in the morning of July 7, Judge Andrew Wylie, a justice of the Supreme Court of the District of Columbia, issued, on the petition of Aiken and Clampitt as counsel for Mrs. Surratt, an order for a writ of habeas corpus, returnable at 10:00 A.M. of that day and directed to General Hancock, in whose custody Mrs. Surratt was, to show by what legal authority she was detained.

At 11:30 A.M. General Hancock appeared in Judge Wylie's court and through his counsel, Attorney General Speed, announced that he did not comply with the writ by reason of an order of the President of the United States, issued July 7, at 10:00 A.M., which declared that the writ of habeas corpus had been theretofore suspended and that the President had especially suspended the particular writ before the Court. This order also directed the immediate execution of the previous Presidential order given upon the judgment of the military commission.

Judge Wylie announced that he had no alternative but to yield to the order of the Chief Executive.

A gallows to accommodate the four condemned had already been constructed in the courtyard of Arsenal Prison. Between one and two o'clock all were hanged.

On July 15, for reasons never disclosed to the public, the place of imprisonment for Dr. Mudd, O'Laughlin, Arnold and Spangler was changed. The order to confine them at Albany was revoked, and a new order directed that their incar-

ceration should be in the remote military prison on Dry Tortugas Island in southern Florida. It was there that the prisoners were taken to begin their sentences.

## AFTERMATH

Mrs. Surratt's execution was followed by an amazing train of consequences. It is no overstatement to say that the general public was stunned by the news of her execution. She was the first woman in America to be executed by an order of the Executive or Judicial Departments of the United States Government. Most people, save those within the inner administration circle, had confidently expected that at the last moment her sentence would be commuted to life imprisonment.

Astonishment soon gave way to suspicion and accusation. Ugly rumors began to circulate. Why had all of the male defendants been chained and hooded and allowed to talk only to administration officials or to their counsel in the presence of administration representatives? Why had execution of the four been set within forty-eight hours after Johnson had officially approved the commission's finding? Why had the four sentenced to prison terms been consigned to the fever-infected military penitentiary at Dry Tortugas? Was it because the "higher-ups," and particularly Johnson, who had profited most by Lincoln's death, were afraid of the disclosures which the so-called conspirators might make?

It became known that Payne, when he faced the gallows on July 7, had solemnly declared to General Hartranft that "Mrs. Surratt was innocent of the murder of the President and of any knowledge thereof." Hartranft had officially reported Payne's statement to Stanton. Why had not the Secretary of War brought the declaration to Johnson's attention? And why had Stanton suppressed the diary found on Booth after he was shot?

And it was strange, too, that Booth had on the day before the assassination left a card for Johnson at the Kirkwood

House reading, "Don't wish to disturb you. Are you at home?" Was there any truth in the story that Johnson and Booth had been well acquainted—indeed, had often been drunk together and kept mistresses who were sisters? These and other ugly questions were pressed with increasing virulence as time went on.

Some of the mystery about the conspiracy and trial was cleared up the following year. After the assassination there had been frantic activity to track down John Surratt and bring him to trial with the eight other alleged conspirators. It was known or assumed that he was in Montreal, and detachments of Federal officers were hastily sent to Canada to hunt for him.

The search proved fruitless. At the time Surratt was concealed in Montreal and in a near-by village by a former member of the Confederate secret service and a Catholic priest. He stayed in hiding until September and then, without any particular attempt to disguise, took ship for England. In England he was recognized and, as it appeared later, his presence was made known to the American authorities. For some undisclosed reason he was not molested and, in October, made his way to Italy and the Papal States. There, under the name of Watson, he enlisted in the Papal Guards.

In April of 1866 his identity was discovered by a fellow guardsman—Henry B. Sainte-Marie. Sainte-Marie was a native of Maryland and had known Surratt there. Surratt at first denied his identity but later, during a drinking bout with Sainte-Marie, admitted that he was John Surratt and boasted of his association with Booth.

Sainte-Marie, sensing the $25,000 reward which had been offered for Surratt's capture, at once got in touch with the American Minister, General Rufus King.[9] King immediately reported to Secretary of State Seward. After what would appear to have been a considerable and unnecessary delay "to

9 For reasons never disclosed the reward was "revoked" by an order of the War Department on November 24, 1865. However, after the trial, Sainte-Marie was paid $10,000 in addition to his traveling and other expenses.

make certain of the identity" extradition proceedings were instituted.

On November 7 Surratt was arrested by order of the Papal authorities. Despite elaborate precautions taken to prevent his escape, he eluded his guards and made his way first to Naples, then to Malta, and finally to Alexandria. There he was again arrested and turned over to the American authorities. A month later he was placed in heavy irons aboard a ship bound for America. It arrived at Washington Navy Yard on February 4, 1867.

On February 19, 1867, Surratt was indicted by a grand jury of the District of Columbia, and charged with the murder and entering into a conspiracy to murder Abraham Lincoln.

The Milligan case,[10] decided by the United States Supreme Court in December of 1866, had determined that the trial of a civilian by a military tribunal, such as that which had tried Mrs. Surratt, was unconstitutional. The highest judicial authority in the land had given legal sanction to the argument which Reverdy Johnson had so vainly urged on Mrs. Surratt's executioners only eighteen short months before. John Surratt had to be tried in a civil court and by a jury of his peers.

This was not the only advantage Surratt won by his flight and delayed trial. The wind of popular feeling had veered. The administration was under suspicion and sentiment outside administration circles was well-nigh unanimous that Surratt, no matter what the presumptions were against him, was entitled to a fair trial.

Able and experienced counsel volunteered for his defense. Joseph H. Bradley, the leader of the Washington bar, and Richard Merrick, a splendid lawyer and brilliant orator, appeared for him. Moreover, the defense, with the record of the military trial available, knew in advance the testimony of many of the witnesses who would be called by the prosecution. And contrary to the rule of the military tribunal, John Surratt could take the stand and be heard in his own defense.

10 *Ex Parte Milligan, 4 Wallace* (71 U. S.) 2.

The administration did its best to overcome these handicaps. E. C. Carrington, the district attorney for the District of Columbia, was a well-regarded and able lawyer, but his forebears were Virginians and one of his brothers had served in the Confederate Army. This rendered him suspect, and Stanton and Seward took no chances; they placed Edwards Pierrepont in charge of the prosecution. Pierrepont was a prominent trial lawyer of New York, a bosom friend of Stanton, and under heavy obligations to both Stanton and Seward. Assisting him, and also selected by Seward, was Albert Gallatin Riddle, a well-known Washington lawyer of marked ability. The prosecution enjoyed another advantage—it picked its own trial judge, George P. Fisher. It was accurately predicted that Judge Fisher would justify the confidence of his sponsors; he would do all in his power—through his rulings on evidence and his charge to the jury—to bring about the conviction of the accused.

On June 10, 1867, the trial of John Harrison Surratt got under way. A jury satisfactory to both sides was selected. The jury was characterized by one newspaper as "the best Washington has seen in many years." All its members were men between forty and fifty years of age. Half of them were merchants. All enjoyed high respect in the community. Several of them had been members of the Washington city council. There were no pronounced radical Republicans and no secessionists on the panel.

The prosecution elected to rest its case on the general evidence introduced at the military trial of the assassination of the President, the attack on Secretary Seward and the connection of Surratt with Booth and the other alleged conspirators, and to place its major emphasis on new evidence that Surratt had been in Washington, and presumptively playing his part in the conspiracy, on April 14. The defense, sensing the weakness in the Government's case and the strength of its own in this last respect, maneuvered with great adroitness to make it the determinative issue in the case.

To prove that Surratt was in Washington on the day when

Lincoln was assassinated, the prosecution produced thirteen witnesses. Seven of these "thought" they had seen Surratt on that day, or had seen a man "that looked a good deal like him," but said they could not be absolutely positive in their identification. Three of them had discreditable occupations or criminal records. All thirteen suffered grievously under Mr. Bradley's devastating cross-examinations.

It was well established that Surratt had been in Montreal on April 12. Five witnesses for the defense took the stand and swore they had seen him and talked with him in Elmira, New York, on the morning and afternoon of the thirteenth. All were men of substance and unimpeachable. Elmira was some three hundred miles distant from Washington. The defense showed by railroad employees and timetables that washouts and disrupted schedules would have made it impossible for Surratt to have taken a train out of Elmira on the afternoon of the thirteenth and arrived in Washington on the fourteenth. There was positive and uncontradicted evidence that Surratt was in Montreal on the sixteenth.

Weichman appeared as the chief witness against Surratt. To his previous testimony he added details, but these were directed not so much against John Surratt as against his mother. The prosecution was at least as anxious to justify the execution of Mrs. Surratt as it was to obtain a verdict of guilty against the son.

If the direct examinations of the Government's witnesses are alone considered, the prosecution made a much stronger case against John Surratt than it did against his mother. There was, however, this important difference between the two trials. In the second trial every one of the Government's witnesses had to undergo the acid test of intelligent and brilliant cross-examination. Few of them survived it.

There were, moreover, sensational circumstances which directed suspicion at the prosecution. The register of the hotel at Elmira, New York, where Surratt had stopped immediately preceding the fifteenth, had disappeared. Further-

more, Surratt testified that on the fifteenth he had gone from Elmira to Canandaigua, New York—some fifty miles distant—and from there had sent a telegram. The original of it—held by the Court to be the only competent evidence—had also disappeared from the telegraph company's files! In Canandaigua Surratt had registered at the Webster Hotel under the name of John Harrison. There was no question that the handwriting in the register was Surratt's, but the Court refused to admit the register in evidence because, it said, while it might have been competent if offered by the prosecution, it became, when offered by the defendant, "self-serving testimony."

The circumstance which told most heavily against the Government was the diary taken off Booth's body after he had been shot. The book had been effectively kept out of the military trial. It contained numerous references to the kidnaping plot and had the Government not suppressed it entries would have confirmed the defenses of some of the defendants—particularly Atzerodt, Arnold and O'Laughlin. On the trial of John Surratt the prosecution was forced by the defense to produce Booth's diary. Entries made in it by Booth as late as the thirteenth and fourteenth of April indicated clearly that the murder plot had not been conceived by Booth until a day or two before its attempted execution—and that no one of Booth's associates other than Atzerodt, Payne and possibly Herold had knowledge of it. Nor was that all. Eighteen pages of the diary, which presumably would have contained entries made earlier in April and March, were missing.

Surratt's testimony was relatively brief. He had been a party to the kidnaping plot, but it had never gone beyond the talk stage. He had known nothing about Booth's plan to kill the President, the Secretary of State, the Vice-President and General Grant.

The summations of the Government's counsel were unrestrained and vicious, but brought no protest from the trial

judge. The Court's charge came as close to a direction to find the defendant guilty as language short of a specific direction could make it.

On July 7, at a little past noon, the jury retired. It deliberated for nearly three days. At the end of that time it reported to the court that it was unable to agree, that from the outset it had stood eight for acquittal and four for conviction.

Surratt was returned to the old Capitol Prison. After six months he was admitted to $25 000 bail, only to be immediately rearrested on a new indictment charging him with conspiracy and treason. This charge, however, was speedily dismissed. More than two years had elapsed since the perpetration of the supposed offense, and prosecution was barred by the statute of limitations. In June of 1868 Surratt was released. Three months later the murder indictment pending against him was dismissed. There was no further prosecution.[11]

The trial of John Surratt had a startling immediate consequence. During the summations for Surratt both Bradley and Merrick made bitter and sarcastic references to the military tribunal's verdict against Mrs. Surratt, and, *particularly, to the hypocritical recommendation for mercy which had been signed by a majority of the judges and ignored by Secretary of War Stanton and President Johnson.* Although there had been rumors the year before of such a recommendation, the press had given it no publicity, and no information concerning it had come from any official source. Now, however, the public clamored for the facts. And this is what developed.

General Holt, Judge Advocate General, had been present throughout the commission's deliberations and had strenuously argued for the death penalty for all of the defendants. Through Holt, Secretary of War Stanton was continuously kept informed of the course of the tribunal's deliberations

11 Surratt's life after his release from prison was uneventful. He taught country school for a while in Maryland, and was later employed for a number of years as freight clerk for a steam-packet company in Baltimore. He died in 1916.

and the attitudes of its several members. Both Holt and Stanton protested vigorously when the penalties for Mudd, O'Laughlin, Arnold and Spangler were fixed at terms of imprisonment. But the commission, despite the pressure, adhered to its convictions.

Five of the nine judges had declared themselves in favor of a life-imprisonment sentence for Mrs. Surratt. Holt and Stanton made violent objections. The five were reluctant to yield their positions. Stanton suggested to Holt that he obtain a compromise: the five judges should join the other four in a verdict of death for Mrs. Surratt, but sign a recommendation that the sentence should be commuted by the President to life imprisonment. Holt proposed the compromise to the commission and argued that it would "preserve unanimity in the court." Furthermore, said Holt, if the death penalty were pronounced and publicized, John Surratt might come forward and give himself up. And if Johnson pardoned Mrs. Surratt, he would get credit with the public for having performed a merciful act.

The five recalcitrants agreed to the plan. Judge Advocate Bingham drafted the recommendation. It was addressed to no one. General Ekin copied it, and he and his associates, Hunter, Kautz, Foster and Tomkins, signed it. The document read:

> The undersigned members of the commission detailed to try Mary E. Surratt and others for conspiracy and the murder of Abraham Lincoln, late President of the United States . . . respectfully pray that the President in consideration of the age and sex of the said Mary E. Surratt, if he can upon the facts of the case find it consistent with his sense of duty to the country, commute the sentence of death which the court have been constrained to place upon her to imprisonment for life.

Johnson had been ill and was confined to his bed when the tribunal gave its verdict. It was communicated to him by General Holt, who read him a summary report of the commis-

sion entitled "Formal Report of the Case." Whether Johnson read, or had read to him, any part of the transcript of the evidence is, to say the least, doubtful. One thing is certain: the "Formal Report of the Case" contained no reference to the recommendation for mercy.

When these facts were disclosed to the public, there was literally "confusion worse confounded." Johnson declared that he had never seen the recommendation for mercy and that neither Holt nor Stanton had told him about it. Holt accused Stanton of having suppressed it. Stanton accused Holt of having withheld it from Johnson when he read him the commission's report. The truth remains in doubt.

There are circumstances which would seem to support Johnson's contention that the paper was never brought to his attention, and to settle responsibility for the crime—it cannot be otherwise characterized—on Stanton and Holt and his associates.

The recommendation seems to have disappeared from the files of the trial immediately after Johnson signed the order executing the commission's verdict.

Judge Advocate General Holt prepared an official report of the proceedings for the record. It contained no reference to the communication of the five judges which recommended commutation of the death sentence.

Ben Pittman, the chief shorthand reporter of the trial, published in November 1865 "An Authentic Record of the Trial of the Assassins of the late President." It contained no reference to the recommendation for mercy. It is quite possible that Pittman, who was not present during the deliberations of the commission, knew nothing of it. But Pittman's record is prefaced with the statement of Brigadier General Henry L. Burnett, Judge Advocate, that he had personally examined the record prepared by Pittman and that he certified it was correct. That Burnett knew of the recommendation there can be no doubt.

Captain Wood, Mrs. Surratt's jailer, wrote long afterward that Johnson was troubled by the furor which followed Mrs.

Surratt's execution. The President sent for him and asked him whether he thought she was guilty. Wood answered that she should not have been hanged, and Johnson, according to Wood's account, said he regretted he had not commuted her sentence. Apparently at that time neither Johnson nor Wood knew of the recommendation for mercy.

It is true that the relations between Johnson and Stanton were severely strained during the two years following the military trial. Yet it may be significant that in less than a month after the John Surratt jury had been discharged and when the agitation over the controversial recommendation for mercy had reached its height, Johnson addressed a letter to Stanton, dated August 7, 1867, which read:

SIR:
Public considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted.
(Signed) ANDREW JOHNSON, President of the United States.

Stanton refused to resign. Johnson issued an order of peremptory dismissal. Stanton refused to relinquish his portfolio and barricaded himself in his office.

The Secretary of State may have considered he had legal authority for his defiance. Immediately after Lincoln's assassination Johnson had allowed himself to be completely dominated by the so-called Republican Radicals. These included Stanton and a powerful group of legislators in both houses of Congress. The Radicals advocated harsh retaliatory measures against the South. Their view was that the Southern states had "rebelled against the Union," had been conquered after a bloody and costly war, and, therefore, should not be readmitted as sovereign states, but ruled as conquered provinces.

In the course of his first two years as President, Johnson did a complete about-face. By 1867 he was firmly convinced that his great predecessor's policy of generosity and "binding up the nation's wounds" was the right policy. This brought him into direct, bitter and violent conflict with the Radicals.

Simultaneously with the passage of the National Act of Reconstruction, Congress had passed, some say at Stanton's instance, the so-called "Tenure of Office Act." Both had been disapproved by Johnson and enacted over his veto. The Tenure of Office Act deprived the President of the right to remove officials whose appointment required Senate approval unless the removal also received such approval.

By his discharge of Stanton, Johnson had, in the opinion of the Republican Radicals, violated this law. This defiance of the assumed legislative prerogative, added to an accumulated catalogue of other grievances, spurred Johnson's enemies to action. On February 24, 1868, Congress, controlled by Radical majority, took an unprecedented action—one unknown before or since in the history of the United States. It voted the impeachment of the President. The most prominent of the eleven articles of impeachment was that Johnson had removed the Secretary of War without the consent of the Senate, in violation of the Tenure of Office Act.

Andrew Johnson's impeachment trial was held before a hostile Senate served by Stanton's old henchman, John A. Bingham. The circumstances may well have prompted the accused President to think back to that other trial, less than three years before, in Arsenal Prison. If so, Johnson may have also remembered a plain woman who, without influence or opportunity for adequate defense, faced a prejudiced court of his own appointment and the opposition of the same powerful, resourceful and ruthless Stanton, determined then as now to bring about the destruction of the object of his hatred by whatever means were necessary.

There was in Johnson's favor, however, one advantage which was denied Mrs. Surratt. Adverse judgment against him had to have the concurrence of two thirds of his judges. The vote, at the end of a farcical hearing, stood thirty-five against and nineteen for him—one vote short of the constitutional requirement.

The failure to impeach Johnson marked the decline of Stanton's star. Except for a brief interlude when Grant served as acting secretary, Stanton held his cabinet post until Grant's

inauguration as President in 1869. Stanton had confidently expected that, with Johnson removed from office, his own enhanced prestige would land him in the Presidency in the 1868 election. With the nomination of Grant his dream of attaining the supreme authority was ended. Then having secretly done everything he could to block Grant's nomination for the Presidency, Stanton joined the bandwagon crowd after the 1868 convention and worked hard for Grant's election. He confidently expected to retain his cabinet post. In this he was disappointed. Grant, profiting by the unfortunate experiences of Lincoln, endeavored to surround himself with men who were not only loyal to the Union, but also loyal to him. Under such specifications there was no place for Stanton.

Stanton, however, still had friends, and in December 1869 these succeeded in getting Grant to appoint him to a vacancy in the Supreme Court of the United States. He was promptly confirmed by the Senate, but this last honor had come too late. Stanton's health had been failing and he was a sicker man than either his friends or enemies knew. His Herculean labors during the eight most fateful years of the Republic had taken their toll. He died within the week following his appointment. There was a widely circulated story, persistent but utterly without substantial foundation, that he had committed suicide. Some romanticists have built on this flimsy foundation the additional fantastic assumption that his self-destruction was prompted by remorse for the part he had played in bringing about Mrs. Surratt's death.

While the dramatic fight between Stanton and Johnson was building to its amazing climax, a drama of a far different sort was being enacted at the military prison at Dry Tortugas. In the summer of 1867 an epidemic of yellow fever swept through the prison. It killed off hundreds of the inmates, many of the prison officials and all of the penitentiary's medical staff. With the plague at its height, Dr. Mudd begged to be allowed to help his fellow prisoners. In their desperate extremity the prison authorities allowed him to take over. His stern and sensible measures—largely improvements in sanitation and the living conditions of the convicts—soon

brought the epidemic under control. In gratitude, all of the officers at the post joined in a petition to the President that Dr. Mudd be released. There was the inevitable delay, but one of President Johnson's last official acts was to pardon not only Dr. Mudd, but also Arnold and Spangler. O'Laughlin had fallen a victim of the plague.

Arnold returned to Baltimore and obscurity. Dr. Mudd returned to his practice in Bryantown, Maryland. With him came Spangler, who had attached himself to the doctor with a doglike devotion which continued throughout his life.

What of Lloyd? The truth is obscure. One widely circulated story has plausibility: he drank himself to death and died as he had lived—a coward, calling in his death agony upon God to forgive him for having, by his lying, brought Mrs. Surratt to the gallows.

Weichman, by repeatedly trading on the "great sacrifices" he had made and the help he had given the Government in its fight to convict the Lincoln conspirators, kept himself more or less continuously on a Federal payroll until 1884, when the victorious Democrats took unto themselves the spoils of office. When Weichman realized that his prospect of living out his life in Federal employment in Washington was hopeless, he moved to Anderson, Indiana, where his brother was the local parish priest. There he started a business-and-shorthand school, in which he did practically all the teaching. It was not a particularly profitable venture but it gave him a living. It is said that throughout his life he carried a pistol and lived in mortal dread lest some avenger of Mrs. Surratt would kill him. Indeed, he claimed that on two occasions he had been shot at from ambush.

Weichman lived until June of 1902. When he was told his end was approaching, he called from his bed for pen and paper, and gave the world his final testimony:

This is to certify that every word I gave in evidence at the assassination trial was absolutely true, and now that I am about to die, with love and mercy I commend myself to all truth-loving people.

He signed the statement in the presence of witnesses and a few hours later passed away.

After a controversial and famous trial there usually appears an inevitable spate of memoirs by participants or interested onlookers. The Lincoln conspiracy trial evoked many such accounts, most of them, unfortunately, concerned more with self-exculpation or self-interest than with fidelity to truth.

Before his death Lincoln had not been without bitter enemies and many detractors, but history affords no parallel in which the death of a great but controversial figure silenced so effectively all criticism of the man and his acts as did Lincoln's assassination. Soon there remained only paeans of praise and gratitude for his service and his sacrifice. Almost before he was entombed Lincoln had become a legend.

A cult—the students of Lincolnia—was born. Its devotees, counted by the hundreds, have traveled the highways and byways searching for more, and ever more, light on the life and death of the Great Emancipator. One result of the exhaustive researches of these zealous delvers into the public records and surviving papers of Lincoln's contemporaries has been a wealth of dramatically told stories which have spun a fantastic web of mystery around the assassination. None of these, however, has increased substantially the information which is to be derived from the trial record, or which was revealed to the public following the trial of John Surratt.

With the full story told then, what can be concluded respecting the judgment against Mrs Surratt?

She was adjudged guilty solely on the circumstance of her failure to recognize Payne when he showed up at her door on the night of her arrest and on the testimony of Weichman and Lloyd.

The failure of Mrs Surratt to identify Payne on the night of her arrest was satisfactorily explained by Payne's complete disguise, the dim light and the woman's failing eyesight.

Lloyd can be at once eliminated as an obvious, if not a proved, perjurer.

The record and acceptable extraneous evidence support

the charge that Weichman suppressed facts within his knowledge which would have aided Mrs. Surratt. He supplemented other facts with false and damaging details. Some of his inferences, accepted as evidence, had no basis in fact. All of these deviations from truth can logically be charged to Weichman's self-interest. Either he had been a Southern sympathizer or he "had been playing both sides." He was a member of the Surratt household. He was a close friend of John Surratt. He knew Booth, Payne and Atzerodt and the Confederate agents, Mrs. Slater and Howell. He was suspect, and knew it. So he gave the Government the testimony it needed in order to save himself.

Had Mrs. Surratt been tried in a civil court, before an honestly selected jury, she would, in all likelihood, have been promptly acquitted. In normal times any civil court of review would have set aside a judgment of conviction based on the evidence before the military tribunal. Crowning the whole unstable structure is the cruel fact that the military tribunal which condemned her was without jurisdiction to try her!

When the Supreme Court of the United States ruled in the Milligan case that a military tribunal of the same character as that which had tried the Lincoln conspirators could not usurp the functions of the operating civil courts, and court-martial civilians, it made this solemn pronouncement:

> The importance of the main question [the jurisdiction of the military court] . . . cannot be overstated; for it involves the very framework of the Government and the fundamental principles of American liberty.

The case of Mary Eugenia Surratt is a frightful and convincing demonstration that there is no principle within the framework of our Government more fundamental and more to be guarded than the right of a civilian accused of crime to a trial by an impartial jury of his peers in a civil court.

# II

The Trials of

ALBERT B. FALL

*and*

OTHERS

for Bribery and Conspiracy To Defraud the United States of

THE TEAPOT DOME AND ELK HILLS OIL RESERVES

(1925-1930)

## 2

# The Teapot Dome Cases

THE TEAPOT DOME SCANDAL *with its disclosures of venality at the highest levels of government shocked the nation as it had not been shocked since the revelations of corruption in the Grant administration fifty years before.*

*Everything about the Teapot Dome affair was extraordinary. There was the United States Senate investigation headed by the incorruptible and redoubtable Thomas J. Walsh. There was the subject matter of the investigation—the bartering away for a comparative "mess of pottage" of the fabulously rich naval oil reserves. There was the archculprit—Secretary of the Interior Albert Bacon Fall. Finally there were the beneficiaries of official corruption—Harry F. Sinclair of the Mammoth Oil Company and Edward L. Doheny of the Pan-American Petroleum & Transport Company, two of the richest and most powerful, and where their interests were concerned, two of the most resourceful and ruthless businessmen in America.*

*The decade of litigation which followed the sensational findings of the Senate committee was no less remarkable: two civil trials and six criminal trials which finally restored the naval reserves to the United States, put one of the manipulators who flouted legal processes in jail for nine months and landed the archcriminal—the betrayer of his official and public trust—behind prison bars.*

*Today these cases have a dual significance. For lawyers they record a highly complex and bitterly contested litigation in which both sides were represented by some of the most brilliant advocates of their generation. For laymen these cases demonstrate democracy's boast that no man, rich or poor, of high or low estate, is above the law.*

In 1834 the French philosopher De Tocqueville wrote in his shrewd analysis of democracy in America: "In democratic republics the power which directs society is not stable, for it often changes hands and assumes a new direction. But, whichever way it turns, its force is almost irresistible."

The truth of that observation on the flexibility and, sometimes, instability of American Government has been repeatedly demonstrated—perhaps never so strikingly as in the United States' national election of 1920.

World War I—the "war to end war"—was over. The patriotic fervor which had sent 3,000,000 Americans to the battlefields of France to the accompaniment of the martial strains of "Over There" and "Tipperary" had cooled. The Treaty of Versailles, with its League of Nations and dream of perpetual peace on earth, had been rejected by the Senate of the United States. There were worldwide postwar dislocations and distresses. There was near chaos at home: inflation followed by deflation, buyers' strikes, business failures, widespread unemployment, I.W.W. disturbances, fiery-cross burnings by a recrudescent Ku Klux Klan, "Red" scares, race riots and general unrest.

"The power which directs"—the irresistible force of the majority—demanded a change, "a new direction." It was tired of altruism, tired of idealism, tired of Woodrow Wilson with his cold intellectual superiority and lofty preachments of America's duty to humanity. It wanted to put all abstract humanitarianism and long-range formulas behind it and concentrate on measures to attain the practical near-at-hand things—peace at home, an end to governmental intermeddling in private business and, for the plain citizen, security through a steady, well-paid job.

The 1920 Republican Convention offered the ideal candidate to satisfy the nation's mood—Warren Gamaliel Harding. No one had ever accused this man of altruism, idealism or intellectual brilliance. His service as a United States Senator

from O' · ) had been undistinguished. But he did not preach and he w .s superbly handsome—some newspapers said he had "the face of a Washington"—warmhearted, affable and tolerant. Moreover, he was conservative and dependable—a man "with his feet on the ground," a typical American. veritable Babbitt from Main Street, U.S.A. This was the man who emerged from the "smoke-filled" room in the Congress Hotel in Chicago as the final choice of his party.

One of Harding's first campaign speeches was perfectly tuned to the popular chord: "America's present need is not heroics, but healing, not nostrums, but normalcy; not revolution, but restoration; not surgery, but serenity." And the slogan "Back to Normalcy with Harding and Coolidge" became the keynote of the campaign.

Neither Harding nor anyone else defined this new and appealing word *normalcy*. Definition was not necessary. It has frequently been remarked by the political wise men that "people usually go to the polls to vote against somebody." In 1920 the voters flocked to the polls to vote against Wilson who was not a candidate, a war that was already over and conditions which had inevitably followed the war. Harding was triumphantly elected.

He received as much popular good will as was ever vouchsafed to a newly elected President. The great majority of American voters was happy in its selection. As Frederick Lewis Allen, a popular historian of contemporary events, has recorded,[1] "getting away from the austerity of Wilson was as warming as a spring thaw after a winter of discontent."

The "honeymoon" following the inauguration of a new President lasted longer than usual. There was general approval of the new cabinet selections. The appointment of such outstanding figures as Charles Evans Hughes for Secretary of State, Herbert Hoover for Secretary of Commerce and Andrew W. Mellon for Secretary of the Treasury obscured

[1] Frederick Lewis Allen, *Only Yesterday* (New York and London: Harper & Brothers, 1931).

for the time such inferior selections as Edwin Denby for Secretary of the Navy, Harry M. Daugherty for Attorney General and Albert B. Fall for Secretary of the Interior.

The prestige of the administration was greatly enhanced in its first year by the success of the Washington Conference for the limitation of naval armaments—treaties with Great Britain, Japan and France halted the mad, tax-burdening competition for naval supremacy. This accomplishment was due entirely to the genius of the great Secretary of State, but the popular verdict gave credit to Harding.

Harding profited similarly from the splendid efforts of his Secretary of the Treasury. With the support of a co-operative Congress, governmental expenditures were drastically cut, income taxes lowered and the national debt reduced

His pardon of labor's martyr, Eugene V. Debs,[2] and his aid to the steelworkers in their successful fight for an eight-hour day won Harding the plaudits of union labor.

But if Harding reaped the rewards of the efforts of his conscientious and able appointees, he was eventually to be plagued to his death by the acts of his unworthy ones.

The storm clouds began to gather in the spring of 1923. First was the Senate investigation into the administration of Charles R. Forbes, whom Harding had appointed head of the Veterans Bureau. Rumors of "kickbacks" by contractors to whom contracts for the construction of veterans' hospitals had been given had reached the President before the inquiry had been instituted. As a result Forbes had been asked for his resignation and hurried aboard an ocean liner bound for Europe. Charles F. Kramer, Forbes' closest assistant and legal adviser to the Veterans Bureau, committed suicide rather than face the inquisitors.

Within three months there was another suicide—this time it was "Jess" Smith, confidant and inseparable companion of Harry M. Daugherty, the Attorney General. In an incredibly

[2] Debs had been convicted in 1918 for "obstructing the conduct of the war," and had served three years in the Federal penitentiary at Atlanta. Harding commuted his ten-year sentence to expire December 24, 1921.

short time after coming to Washington, Smith had established a reputation as the "number-one fixer" of the administration. And the reputation was justified. Smith "delivered" and the natural conclusion of those who profited by the deals was that Daugherty was in on them.

When Smith was found shot to death the rumor that "Jess had killed himself to protect Daugherty" spread. There were also veiled hints that the President was either unwilling or incompetent to deal with the accumulating embarrassments imposed upon him by his friends.[3]

Perhaps it was to avoid any more unsavory revelations or at least to be absent when they occurred that Harding decided to leave Washington. For some time he had been planning a combination vacation and barnstorming trip which would take him to Alaska. On June 20, 1923, wearied of Washington and beset with apprehensions, he began the journey which was to be his last.

Many and irreconcilable versions of that journey and of the President's mysterious fatal illness have been circulated. Whatever the truth, death, which came on August 2, mercifully spared Harding the humiliation of living through the exposure of the greatest scandal of his or any other administration. Had he lived, Harding would have seen his trusted friend and his appointee as Secretary of the Interior, Albert Bacon Fall, brought to the bar of justice to answer for crimes committed against the United States.

In the early part of 1922, the second year of the Harding administration, the United States Senate began to investigate the management of certain United States naval oil reserves.

3 Much later (1927) Forbes was apprehended, tried, convicted and sentenced to prison on a charge of having defrauded the government, and one of Jess Smith's contacts—Thomas W. Miller, Harding's appointee as Alien Property Custodian—was convicted of accepting a bribe to influence an official action and sent to jail. In the latter case, it was shown that Smith, for his "services" in expediting a doubtful claim through the Alien Property Custodian's office, received something over $200,000, $50,000 of which he gave to Miller and $40,000 of which he gave to Mal Daugherty, the Attorney General's brother. The $40,000 was deposited in a bank in Washington Court House, Ohio, in a special account which was controlled by Harry M. Daugherty. Harry M. Daugherty was later indicted as the receiver of a bribe, but after two trials resulting in disagreements, the charges against him were dismissed.

It was only a few months after Harding's death that this investigation exposed Albert Fall and others who had sought to enrich themselves by the illegal disposal and exploitation of these reserves.

The Senate investigation was touched off by a citizen of Wyoming, a small oil operator. In the early part of April 1922 this citizen wrote a letter to his Senator, John B. Kendrick, and in this letter he stated that oil land belonging to the government and known as the Teapot Dome Naval Reserve was being leased by the Secretary of the Interior to one of Harry F. Sinclair's companies—the Mammoth Oil Company. The deal, read the letter, was secret, and no other oil companies had been invited to submit competitive terms for a lease. Furthermore, the oil on this land was supposed to be part of the Navy's oil supply. Why was it being leased at all? The letter asked an even bigger question: What did the Secretary of the Interior have to do with this disposition of Navy reserves?

Senator Kendrick wrote Secretary Fall a courteous, formal letter asking for a statement of the facts of the Teapot Dome transaction. He received no reply. So, on April 15, 1922, Kendrick introduced in the Senate a resolution calling on Fall and Secretary of the Navy Denby to advise the Senate on the particulars of this alleged deal: Were government oil lands being leased to a private corporation and, if so, why?

A Senate resolution could not well be ignored and on April 19 the Department of the Interior released a public statement about the matter. This was a brief declaration, signed not by Fall but by a subordinate official, that a lease of government oil lands in Wyoming had been made to the Mammoth Oil Company and that a contract for oil storage facilities at Pearl Harbor was also being negotiated with the Pan-American Petroleum & Transport Company (a company dominated by Edward L. Doheny), which involved the drilling of wells in what was known as the Elk Hills Naval Reserve in California. The reason given for the lease and contract was that "oil was being drained from these reserves

in very large quantities, amounting to millions of dollars of loss up to the present time, by wells on adjoining lands, and that in a few years the government reserves would be depleted."

On April 21 Fall himself replied to Senator Kendrick's letter and explained that the secrecy which had attended the negotiations for the leases was thought desirable in view of the strained relations with Japan.

The explanations were plausible and apparently satisfied everyone but Senator Robert M. LaFollette (the elder). LaFollette's crusading experience in Wisconsin had ingrained in him a suspicion of all government deals with big corporations. Parting with America's wartime oil reserves was, he felt, sufficiently serious to merit thorough investigation. With no particular opposition from his colleagues, he introduced and had passed a formal resolution directing the Senate Committee on Public Lands to investigate the "entire subject of leases of naval oil reserves," and "compel the presentation before it of all documents and official data connected therewith."

President Harding, either of his own motion or, as it was later charged, at the instance of Fall, took official notice of the Senate resolution. On June 7 he addressed a letter to the Senate in which he gave his unqualified approval of the actions of his appointees, Denby and Fall, in the handling of the naval reserves.

Thomas J. Walsh, Democratic United States Senator from Montana, was named chairman of the subcommittee of the Senate Committee on Public Lands to conduct the investigation. The selection of Senator Walsh insured an honest and thorough inquiry. Walsh, before entering the United States Senate in 1913, had been Montana's ablest lawyer. His practice had been largely in the field of mineral law. He was a personally incorruptible man, who set high standards for public service. He was known as an unapproachable, austere, determined and relentless prosecutor. At the time he assumed the chairmanship of the investigating committee he was six-

ty-two years old, but physically vigorous and at the peak of his exceptional mental power.

Walsh proceeded slowly and methodically. Eighteen months elapsed before he announced he was ready to present his evidence to the committee. By this time the leases to Sinclair's Mammoth Oil Company of the Teapot Dome Reserve, and the contract and leases to Doheny's Pan-American Petroleum & Transport Company (the Elk Hills Reserves) had been completed. The lessees had entered into possession, drilled wells and were extracting oil and building storage facilities. The public had all but forgotten about the flare-up in April of 1922.

The facts Walsh had uncovered soon reminded the public of all these events. Before long people knew the history of these reserves and perceived that recent parts of that history were, to say the least, peculiar.

After the adoption of the Federal Constitution the United States had acquired through conquest and purchase proprietary rights in vast land areas. Most of these lay west of the Mississippi. To encourage their development practically all of the land was thrown open to settlement and private ownership. Walsh's investigation reveals that by an act of Congress passed in February of 1897, public lands containing oil were also thrown open to settlement, exploration and purchase. Location and exploration were permitted without charge, and title could be obtained for a nominal amount. Large areas of public lands in Wyoming and California were explored. Petroleum was found, patents obtained and great quantities of oil extracted from privately owned wells.

This went on until 1909. In September of that year the director of the Federal Geological Survey reported that at the rate oil lands were being patented and exploited it would not be long before the supply of oil would be exhausted. He stressed that in view of the increased use of fuel oil by the Navy there appeared to be an immediate need for conservation.

President Taft acted promptly on the report. He issued a

proclamation, without specific authorization from Congress, which withdrew from disposition in any manner more than three million acres of public oil-bearing lands in Wyoming and California. By acts passed in 1910 Congress confirmed the action of the President.

By 1912 the Navy Department had adopted a fixed policy of constructing warships which used oil burners exclusively. The conservation of oil thus became a vital element in the national defense. To insure the Navy's oil supply the President issued executive orders in September and December of 1912 which directed that certain of the withdrawn lands be constituted as naval petroleum reserves. These areas were to be "held for the exclusive use and benefit of the United States Navy" until such orders were revoked either by the President or by act of Congress.

Naval Reserves One and Two, consisting of 38,969 and 30,000 acres, respectively, were in California. These--the so-called Elk Hills and Buena Vista lands—were the lands later leased to Doheny's Pan-American Petroleum & Transport Company. Naval Reserve Number Three, in Wyoming, was created by an executive order dated April 30, 1915. It was the 9,321 acres in this reserve--the so-called Teapot Dome lands—which were later leased to Sinclair's Mammoth Oil Company. The entire acreage in Reserves One, Two and Three was "proved" oil-bearing land.

In 1920 there was a change in Federal policy on these reserves. Government engineers reported that an alarming quantity of oil was being drained from government oil lands by oil wells in adjacent private property. There were but three ways to combat this threat: the government could either drill off-set wells to limit the drainage, or bore wells on its own land and store the oil, or lease the lands to private companies or individuals for drilling and operation for a royalty payable to the government in oil which could be stored for future use. In February of 1920, Congress, after a careful study, passed with Presidential approval what was known as the General Leasing Act. This act authorized the Secretary of

the Interior to grant permits and makes leases of public oil and gas lands, *exclusive of those withdrawn or reserved for military or naval purposes.* The same act directed the Secretary of the Navy to take possession of all properties within the naval petroleum reserves and "to conserve, develop, use and operate the same in his discretion, directly or by contract, lease or otherwise, and to use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States."

The General Leasing Act was modified by President Harding on May 31, 1921, less than three months after Denby and Fall had been appointed to the cabinet. In an executive order Harding transferred the administration and conservation of all oil and gas-bearing lands in the naval reserves to the Secretary of the Interior. Neither the public nor Congress was informed of this transfer.

By a contract and leases dated April 25, June 5 and December 11, 1922, Fall, as Secretary of the Interior, granted to Pan-American Petroleum & Transport Company the right to drill and take gas and oil from California Naval Reserve Number One (Elk Hills) and certain described lands in California Naval Reserve Number Two (Buena Vista) for "twenty years and so long thereafter as oil or gas is produced in paying quantites." In return for the lease the United States was to receive as royalty quantities of fuel oil ranging from twelve and one-half to thirty-five per cent of the value of the crude oil extracted. The lessee agreed to construct storage facilities, some of which were to be built without cost to the government, but most of which were to be paid for from the United States's proceeds from the sale of part of its royalty oil.

By a lease dated April 7, 1922, Fall, as Secretary of the Interior, granted to the Mammoth Oil Company the exclusive right to take oil and gas from 9,321 acres of land in Natrona County, Wyoming, commonly known as Teapot Dome, in Naval Reserve Number Three, "as long as they could be produced in paying quantities." The consideration to the gov-

ernment was an agreed percentage in royalty oil. By separate agreements, dated December 20, 1922, and February 9, 1923, Mammoth Oil Company agreed to construct for the government facilities for storing the royalty oil. The cost of such construction was to be repaid to the company by its equivalent in royalty oil.

Both of these leases were made, it was asserted, under authority given Fall by the executive order of May 31, 1921.

Such was the officially recorded history of the naval oil reserves. Against that background of meager facts Senator Walsh filled in hitherto unrevealed details of an amazing and disquieting picture.

The first witness called at the committee's hearing on October 25, 1923, was Albert Bacon Fall. By this time Fall was a private citizen; he had resigned as Secretary of the Interior the previous March.

When Fall faced the Senate investigating committee on the first occasion he had many friends among his judges. Some of them had served with him in the Senate. Fall was born in Frankfort, Kentucky, in 1861, and he had been educated in the not too adequate county schools of Kentucky. In 1882, when he was twenty-one years old, he struck out for the sparsely settled and lawless territory of New Mexico, where, for a time, he worked on ranches and in mines and taught country school. He also studied law and was finally, after much diligent but interrupted study, admitted to the New Mexico and Texas bars. Soon he had established a reputation as one of the ablest criminal lawyers in the Southwest. He got into politics—first as a Democrat—and held a number of different local and territorial offices. In 1893 President Cleveland appointed him to a territorial judgeship. In 1900 he shifted his politics and, when New Mexico was admitted to statehood in 1912, ran as a Republican and was elected to the United States Senate. He served in that body until 1921, when President Harding appointed him Secretary of the Interior.

Fall was a picturesque, likable person and an interesting companion. He was one of the closely knit Senate group

which included Harding and had figured prominently in the latter's nomination for the Presidency. Harding, for some inexplicable reason, held a grossly exaggerated opinion of Fall's ability and when he became President told some of his friends that he wanted to appoint Fall Secretary of State. It was with difficulty that he was dissuaded from this act by some of his wiser Republican associates. When he appointed Fall Secretary of the Interior, however, Harding suggested by way of apology that the appointment was only temporary and that he intended to appoint him to the first vacancy which should occur in the Supreme Court.

Fall's appointment as Secretary of the Interior was extremely popular with his cronies in the Senate. He was unanimously confirmed without reference to committee.

Many of the men on the committee now questioning Fall had approved his appointment and were fond of him personally. It is probable that the only one not friendly was Walsh. And at this time Walsh himself was not hostile—he was merely impassive. Fall was to be judged like anyone else, on the evidence.

Fall readily accepted full responsibility for the execution of the leases. He defended his action on the ground that the reserves were being drained of their oil and there was grave danger of their exhaustion. But oil—large reserves of it—was vital to the national defense. He had exercised the discretion which the President had vested in him, had found what seemed to him a solution to the problem and had no apologies to offer for his action. There was, he asserted, no sinister purpose in keeping the negotiations secret. He had not asked for open competitive bids because he knew he could get a better price through private negotiation. He was acting in what he regarded as a military matter under the supervision of the President of the United States, and he did not propose to call international attention to the fact that contracts were being made for enormous storages of oil for use in a possible future crisis.

Walsh asked him about his contacts with Sinclair and Do-

heny since he had left office. Fall replied that since his resignation as Secretary of the Interior he had made a business trip to Europe for Sinclair and Sinclair had paid his expenses—$10,000. He had never asked for nor had he received any compensation for his work.

Similarly, said Fall, he had advised his old friend Doheny in some important matters, "but without any compensation at all."

Fall's forthright answers made a distinctly favorable impression on the committee and the representatives of the press.

The next witness called was Secretary of the Navy Edwin Denby. Denby was a pathetic witness. Apparently all he knew was that the custody and disposition of the reserves had been transferred by a Presidential executive order to the Department of the Interior. Thereafter he had had no responsibility for the handling of the reserves and had followed the recommendations of his subordinates in the Navy Department who were working with the Department of the Interior. He could not even remember whether he had signed any of the contracts or leases with the Sinclair and Doheny companies. His general knowledge of governmental policy with respect to the conservation of oil for Navy use was practically nil. He could not remember that he had ever read the act of Congress which had committed the reserves to his custody. Denby was not dodging; he simply did not know.[4]

After Fall and Denby, Walsh called a number of witnesses from the Navy and other government departments to ascertain, if possible, whether Reserves One, Two and Three were in imminent danger of complete exhaustion from drainage by outside wells. Here there was a sharp and irreconcilable conflict in the evidence. A number of long-in-service, disinterested government employees testified that in their opinion

[4] There was never a suggestion from any source that Denby profited, directly or indirectly, from the execution of the Teapot Dome and Elk Hills leases. However, as the investigation progressed the feeling against Denby mounted. There was talk of impeachment proceedings. The Senate passed a resolution calling on President Coolidge to dismiss him. Coolidge refused, but early in 1924 Denby resigned "to save the President from embarrassment."

the drainage threat was not serious and "any leasing in consequence thereof was unjustified." Commanders Harry A. Stuart and John F. Shafroth, Jr., testified that they had made vigorous protests to their superiors in the Navy Department against the government's relinquishing control of either the Teapot Dome or the Elk Hills reserves. They added that for their insistence they had been detached from their assignments. They were not, they said, consulted when the transfers were made and knew nothing of them until they were accomplished facts.

Fall, on the other hand, testified that in his opinion the danger from drainage was real, and that the prompt extraction of oil from the reserves was imperative if any of it was to be saved for the Navy. In this he was corroborated by Admiral John K. Robison, who became Engineer in Chief of the Navy Department shortly after Fall's appointment as Secretary of the Interior.

The first hearing concluded with this indecisive testimony on the necessity of leasing the oil lands. On December 3, 1923, the Senate committee resumed its interrogation. This time it called Doheny and Sinclair, the presidents of the companies to whom the leases were made, to the stand. Both witnesses answered Walsh's questions with assurance and neither seemed to find any incongruity in their answers. They maintained that the leases were made in the interests of United States security; at the same time they admitted they expected their companies to make a profit of at least $100,000,000 out of the leased rights.

Both Doheny and Sinclair declared with vigor and a show of righteous indignation that Fall had "never received any benefits or profits, directly or indirectly, in any manner whatsoever" from their connection with the leases.

Although the prevailing general impression, epitomized by the press, was that "Walsh was not getting anywhere," the wide publicity given the hearings evoked a deluge of hitherto undisclosed information. Fall, like every other man in public life, had his political enemies. One of the bitterest of

these was Carl C. Magee, editor of the New Mexico *State Tribune* of Albuquerque. Magee offered to swear that in 1920, before his appointment to the Harding cabinet, Fall had complained he was "dead broke" and his New Mexico ranch was run down and his taxes on it ten years in arrears. In 1922, according to Magee and others, there was a remarkable change in Fall's financial condition. He paid all of his back taxes. He made improvements on his ranch which must have cost at least $40,000. He bought the adjoining N. W. Harris ranch. Harry F. Sinclair, the oil magnate, had visited Fall's ranch and shortly thereafter blooded stock—cattle, hogs and a race horse—from Sinclair's Ramapo Hills, New Jersey, estate had appeared in Fall's "scrub" herds.

The Senate committee called in men who might tell more about Fall's sudden financial success. Magee, officials of Otero County, New Mexico, where Fall's ranch was located, N. W. Harris and others established beyond all doubt that in 1922 Fall had purchased the Harris ranch and paid $91,500 for it, and, in the same year, had spent between $75,000 and $100,000 on other land purchases, back taxes and improvements.

The publicity about the blooded stock produced an unexpected volunteer witness—Archibald Roosevelt, son of the great Theodore Roosevelt and brother of Theodore Roosevelt, Jr., then Assistant Secretary of the Navy. Archibald Roosevelt testified he had just resigned as a vice-president of one of Harry F. Sinclair's oil companies because Sinclair's confidential secretary, G. D. Wahlberg, had hinted that "somebody" might have lent Mr Fall money. Wahlberg, said young Roosevelt, had mentioned that a payment of $68,000 had been made to Fall's ranch foreman.

The following day Wahlberg was called to the stand. His testimony approached farce. True, he had talked to Mr. Roosevelt and there had been a conversation about Mr. Fall's ranch. But Mr Roosevelt must have misunderstood him. He had not mentioned the sum of $68,000. What he probably had said was that Mr. Sinclair had sent "six or eight cows" to

Mr. Fall's ranch in New Mexico. It would have been easy for one to have misunderstood "six or eight cows" for "sixty-eight thous."[5]

Whatever one might think of the Roosevelt-Wahlberg "misunderstanding" about the $68,000, the committee was confronted with the solid fact that Fall in 1922 had come into the sudden possession of a huge sum of money. That required an explanation.

Fall, who had retreated to his ranch in New Mexico, was asked to reappear before the committee. He offered excuses and procrastinated, but after a two weeks' delay made the trip to Washington, where he immediately registered at a hotel and went to bed. The committee was notified[6] that he was much too ill to attend a hearing, but was submitting a written statement of his finances which should set at rest any further inquiry.

The statement—which was not sworn to—protested in a long preamble the irrelevancy of any inquiry into his private financial affairs. It did contain a declaration that he had obtained $100,000 cash from the Honorable Edward B. McLean of Washington, D. C. The statement proceeded in a rather indignant vein:

> It should be needless for me to say that in the purchase of the Harris ranch or any other purchase or expenditure I have never approached E. L. Doheny or anyone connected with him or any of his corporations, or Mr. H. F. Sinclair or anyone connected with him or any of his corporations; nor have I ever received from either of said parties one cent on account of any oil lease, or upon any other account whatsoever.

The spotlight was now turned on the Honorable Edward B. McLean. Edward B. McLean was the only son of John R.

[5] When the exact truth of the blooded-stock shipment was ascertained, it was found to have consisted of six hogs, a stallion, six heifers and a bull, worth altogether about $1,400. Fall and Sinclair both testified that Fall paid Sinclair $1,100 for the stock; Sinclair paid the freight charges from New Jersey to New Mexico—something between $800 and $1,000.

[6] December 26, 1923.

McLean, an American pioneer businessman and politician, who, after the Civil War, had built a colossal fortune through the acquisition of newspapers,[7] utility companies, banks and other commercial enterprises. At the elder McLean's death, the son came into possession of the estate. He had married Evelyn Walsh—of Hope Diamond fame—whose fortune was as great as his own.

The McLeans were of a type not infrequently encountered in national and state capitals—rich people with nothing more important to do than to lure the temporary occupants of the seats of the mighty into their dazzling social orbit. They were modern-day courtiers—different from the ancient breed in that they gave rather than received. They desired nothing save the enhanced social prestige which might accrue to them through association with the distinguished representatives of the people.

McLean hobnobbed with the great and was what is known in the lower political circles as a "soft touch." Had the whole truth ever been exposed, it would probably have revealed a staggering list of "accommodations" and "loans" which he had made to persons in official positions. Fall's statement that McLean had "furnished" him with $100,000 in cash surprised no one who knew Washington.

Walsh may not have been surprised; but he certainly was not satisfied. Before Fall's statement could be accepted, it had to be verified. Only McLean could supply that verification. McLean was in Florida when Fall's statement appeared in print and from there, in an effort to forestall the inevitable subpoena, wrote a letter to the committee in which he declared that it was true that in 1921 he had lent Fall $100,000 on his personal note. He added that his health was not good and he hoped it would not be necessary for him to leave Florida and attend upon the committee.

McLean overplayed his hand. By letters, telephone calls and coded telegrams, he bombarded his Washington friends—

[7] The Cincinnati *Enquirer* and the Washington *Post*.

some of them United States Senators—to see Walsh and arrange that he would not have to risk his health by leaving sunny Florida for the pneumonia-infested atmosphere of Washington. All of this only made the suspicious Walsh more suspicious. If the mountain would not come to Mohammed, Mohammed would go to the mountain. And so, on January 9, 1924, Walsh took a train for Palm Beach. He located McLean without difficulty. McLean was not too ill to talk and, under Walsh's relentless probing, came up with a new and startling story.

In November of 1921, at Fall's request, he had drawn three checks aggregating $100,000 on his personal bank accounts and given them to Fall. They were never presented to the banks for payment and in a week or two Fall returned them to McLean, explaining he was getting the money from another source. That, said McLean, was the whole truth about the transaction. Fall had never received a dollar of cash from him.

Later in the month McLean came to Washington and repeated before the full committee and under oath what he had told Walsh in Florida. He justified his earlier failure to say Fall had returned the money by saying he was quite willing to lie for a friend in writing a letter, but would not risk an indictment for perjury. "I was trying," he said, "to go down the line as far as I could for a friend."

The day after McLean told the committee his queer story of the uncashed ambulatory checks—a story which completely contradicted Fall's story that he had obtained $100,000 cash from McLean—Walsh received a startling letter from Fall. It read in part:

I desire to advise you that I have carefully read the testimony which Mr. McLean gave today, and that I endorse the accuracy of the same. I will also say that before giving his testimony Mr. McLean had a conference with me, and I told him that so far as I was concerned, it was my wish that he answer freely; and in this connection I will say that it is absolutely true that I did not finally use the money from Mr. Mc-

Lean which he expressed himself willing to give me because I found that I could readily obtain it from other sources. I wish it thoroughly understood that the source from which I obtained the money which I used was in no way connected with Mr. Sinclair or in any way involved in the concession regarding the Teapot Dome or any other oil concession.

What Fall hoped to gain by writing this letter is obscure. It was an admission that his former statement that he got $100,000 cash from McLean had been a lie and made it certain that Walsh's next move would be to demand that he tell the committee truthfully where he did get the money. Fall should also have guessed that McLean's testimony had put Doheny and Sinclair "on the spot," and that they would be immediately summoned and subjected to further probing. The only conclusion that can be drawn—and later on there was much evidence to support it—was that Fall was becoming mentally confused and could neither think nor act rationally.

Doheny, however, immediately sensed that there was danger in the situation not only to Fall, but also to himself. And he became very eager to tell a story he had withheld from the committee when he was asked whether Fall had ever received any profit or advantage from the Elk Hills leasing. What should he do? Should he wait until someone else told it, should he induce Fall to tell it or should he tell it himself? It was a bothersome problem and he consulted one of his many astute lawyers. It was decided they would talk to Fall, and if Fall did not see fit to talk, Doheny would appear as a voluntary witness before the committee. Doheny and his lawyer got in touch with Fall. They urged him to appear before the committee immediately and tell how he had obtained the money for his recent heavy expenditures. Fall seemed incapable of making up his mind and put them off. Doheny decided to wait no longer and on January 22, 1924, appeared with his lawyer before the Senate committee and asked to be permitted to take the stand and supplement his earlier testimony.

Doheny's new testimony was the high-water mark in the

Teapot Dome investigation. The witness was a mysterious figure, a multimillionaire who had come up from the depths. When he was sixteen he left his native Wisconsin for the great, undeveloped Southwest. There he worked at anything which came to hand, was a mule driver, fruit packer, waiter, book agent and prospector. For years he suffered poverty and hardship, but in the early 1880s he struck a rich vein of silver ore in New Mexico. With capital provided by his mine and with shrewdness and good business sense Doheny acquired additional silver and oil properties and developed them until they yielded a huge fortune. He had studied law and been admitted to the New Mexico bar. He was a modest, retiring man, gave liberally to charity and was well regarded.

Few hearings on the entire Teapot Dome Scandal provided as much material against Fall as did the exchange between Doheny and Walsh. The facts furnished by Doheny supplied the basis for much of the civil and criminal litigation which followed.

Senator Walsh opened the hearing:

I asked the committee to meet this afternoon because I was informed that Mr. Doheny desired to come before this committee and make a statement. If he is present I would like to have him do so now.

Mr. Doheny arose and said he had prepared a statement which he desired to read. Permission was granted, and the oil magnate proceeded:

I wish to state to the committee and the public the following facts. . . . I regret that when I was before your committee I did not tell you what I am now telling you. When asked by your chairman whether Mr. Fall had profited by the contract, directly or indirectly, I answered in the negative. That answer I now reiterate.

I wish to inform the committee that on the thirtieth of November, 1921, I loaned to Mr. Fall $100,000 upon his promissory note, to enable him to purchase a ranch in New Mexico. This sum was loaned to Mr. Fall by me personally.

It was my own money and did not belong in whole or in part to any oil company with which I am connected. In connection with this loan there was no discussion between Mr. Fall and myself as to any contract whatever. It was a personal loan to a lifelong friend. We have been friends for thirty years. Mr. Fall had invested his savings for those years in his home ranch in New Mexico, which I understand was all that remained to him after the failure of mining investments in Mexico and nine years of public service in Washington, during which he could not properly attend to the management of his ranch. His troubles had been increased in 1918 by the death of his daughter and his son who, up to then, had taken his place in the management of his ranch. In our frequent talks it was clear that the acquisition of a neighborhood property controlling the water that flows through his home ranch was a hope of his amounting to an obsession. His failure to raise the necessary funds by realizing on his extensive and once valuable mine holdings had made him feel that he was a victim of an untoward fate. In one of these talks I indicated to him that I would be willing to make him the loan and this seemed to relieve his mind greatly. In the autumn of 1921 he told me that the purchase had become possible, that the time had arrived when he was ready to take advantage of my offer to make the loan.

Under the committee's questioning Doheny amplified his statement. He and Fall had worked in the same mining district in New Mexico as early as 1885. They had practiced law for a while in the same district. But while Doheny had been fortunate, Fall had not prospered financially. Fall became so discouraged that when he talked about the necessity, and hopelessness, of acquiring the neighboring ranch to protect his water supply, Doheny had promised, "Whenever you need some money to pay for the ranch I will lend it to you." Fall had offered to put up the ranch as security for the loan but Doheny said he would give Fall the money on his note. Later, said Doheny, Fall telephoned him that he was ready for the money and Doheny got $100,000 in cash, put it in a satchel and gave it to his son to deliver to Fall.

At this point Senator Walsh asked the obvious question:

You are a man of large affairs and of great business transactions, so that it was not unusual for you to have large money transactions, perhaps, but it was, was it not, an extraordinary way of transmitting money?

Mr. Doheny's reply was, to say the least, unusual:

I do not know about that. I will say that I think I have remitted more than a million dollars in that way in the last five years. . . . In making the decision to lend this money to Mr. Fall I was greatly affected by his extreme pecuniary circumstances, which resulted, of course, from a long period, a lifetime of futile efforts. I realized that the amount of money I was loaning him was a bagatelle to me, that it was no more than $25 or $50, perhaps, to the ordinary individual. Certainly a loan of $25 or $50 from one individual to another would not be considered at all extraordinary, and a loan of $100,000 from me to Mr. Fall is no more extraordinary.

Senator Walsh commented, "I can appreciate that on your side but looking at it from Mr. Fall's side, it was quite a loan."

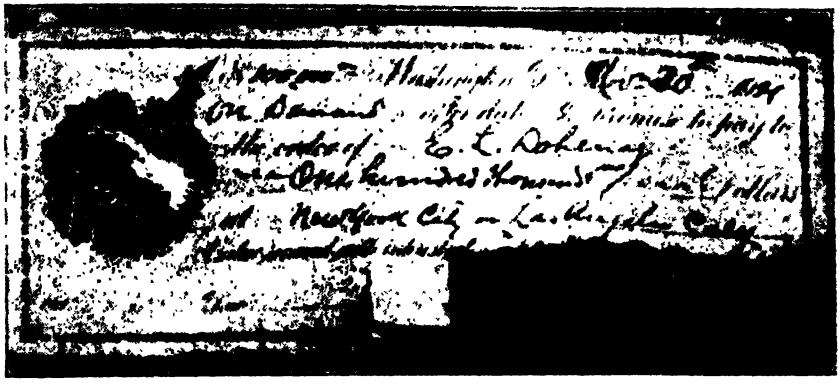
Then Senator Walsh asked Mr. Doheny whether he saw any impropriety in loaning money to an officer of the government with whom he had very large business transactions. Mr. Doheny replied, "No, sir, I did not. And I do not now, Senator, with all due respect to your question."

Doheny was asked whether he could produce the note which he said Fall had given him. He replied that he had searched for the note and had been unable to find it, but that he was still looking for it and thought he would be able to produce it.

The committee was frankly skeptical about the note; one of the members, Senator Kay Pittman of Nevada, suggested openly that the story of the note was a fabrication.

Six days later Doheny returned to the committee and produced the note, but minus Fall's signature—it had been torn off. Doheny explained that he had the note in his possession, intact, in December of 1921. Later, while going over some papers, he remarked to his wife that he had loaned the money to Fall on a demand note to help him out of a serious financial difficulty and that if anything should happen to them (Mr.

and Mrs. Doheny) their executors would immediately press for payment and cause Fall great embarrassment. So he tore off the signature and gave his wife one part of the note to keep and he kept the other part. His son, he said, knew all about the loan to Fall and if it ever became necessary he could readily get a new note. Doheny added that he was sure the missing piece of the note was still among his or his wife's papers.



Albert B. Fall's note to Edward Doheny

Fall returned to Washington on the evening of the day Doheny made his sensational disclosure. He was immediately served with a subpoena and, accompanied by his lawyer, appeared before the committee on February 2. He was a sick and broken man. The robust, ruddy and quick-moving Secretary of two years earlier was a mere shadow of his former self. He had lost more than forty pounds in weight. His flesh hung in wrinkled folds about his face and neck. He tottered and almost fell as he approached the witness chair.

Before a question could be asked him, the former judge, United States Senator and Secretary of the Interior riveted his eyes on a small piece of paper which he held in his trembling hand and read: "I decline to answer any questions on the ground that it may tend to incriminate me."

There was only numbed, shocked silence. Slowly Fall rose from his seat. His lawyer took his arm, and led him to the

door and out the building. It was Fall's last appearance before his erstwhile colleagues.

Fall's appeal to constitutional privilege against self-incrimination and his refusal to testify, following on the heels of Doheny's startling testimony, incited swift action by the Senate. On the same afternoon a resolution was passed which recited that the Doheny and Sinclair leases had been executed under circumstances indicating fraud and corruption and were unauthorized and contrary to law and the settled policy of the government. The resolution directed the President to cause suit to be instituted for their cancellation. It also called for the appointment of "special counsel," independent of the Department of Justice, "to prosecute such other proceedings, civil and criminal, as were warranted by the facts." The House concurred in the resolution the following day and it was approved by President Coolidge on February 8.

Pursuant to the resolution, the Chief Executive appointed as special counsel Owen J. Roberts[8] and ex-Senator Atlee W. Pomerene.[9] These men were to establish the government's case against Fall and his cohorts and to conduct the government's prosecution of them. When President Coolidge announced their appointment he remarked, in his usual laconic manner, "The guilty would be brought to justice and the government's interests protected."

Messrs. Roberts and Pomerene immediately began an intense study of the Senate committee record. They also initiated an investigation of their own.

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[8] When he was named special counsel in the oil cases, Owen J. Roberts was a highly regarded but not yet widely known lawyer. He had graduated from the University of Pennsylvania in 1895 and had obtained his law degree from that institution in 1898. He immediately began to practice law in Philadelphia. His outstanding work as counsel in the oil cases won him national renown and in 1930 President Hoover appointed him an associate justice of the Supreme Court of the United States. He served until 1945. In 1948 he was elected a trustee of the University of Pennsylvania and appointed dean of its Law School.

[9] Atlee Pomerene had had a long and distinguished career as a lawyer and public officer before he earned national prominence as one of the special counsel in the oil cases. He was a graduate of Princeton University and Cincinnati Law School; he began the practice of law at Canton, Ohio, in 1886. In 1911 he was elected United States Senator from Ohio and served in that capacity until 1923, when he retired to re-enter private law practice in Cleveland. After his service in the oil cases he was appointed chairman of the Reconstruction Finance Corporation (1932-1933). He died in 1937.

While they were conducting their researches the Senate committee persisted in its interrogation of Doheny. He was recalled and subjected to hours of grilling examination. First one and then another of the committee members queried him. The questions became increasingly pointed and provocative. Some were blunt and sarcastic and plainly indicative of doubt of the witness' veracity.

Doheny's temper was short; he stood the slurs as long as he could and then lashed back. His target was the Democratic party and his means of attack mudslinging. Fall was a Republican, and Doheny was a Republican. Walsh and most of his heckling examiners were Democrats. It was obvious that the Democrats were making as much political capital out of the situation as was possible, so Doheny tried to discredit the Democrats. He had, he said, put any number of ex-Democratic officers on his various payrolls. Why had he done it? Doheny shouted his reply: "I paid them for their influence." Who were they? The oil man named a few: William G. McAdoo, son-in-law of ex President Wilson and Secretary of the Treasury in his cabinet; Franklin K. Lane, former Secretary of the Interior; Thomas W. Gregory, former Attorney General; Lindley M. Garrison, former Secretary of War; and George Creel, former chairman of Wilson's Wartime Committee on Public Information.[10]

When the committee had finished with Doheny and Fall, Harry F. Sinclair was recalled. In contrast to Doheny, Sinclair was a comparatively young man, and his early life had been much less rugged. His parents had settled in Kansas

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[10] All of these men had found employment with Doheny or in one or another of his corporations after they left office. Unfortunately, Doheny's charges were, because of their sensational nature, widely publicized, and the men accused of peddling influence were injured. McAdoo was the greatest sufferer. It was proved that he had had contacts with Doheny or any of his companies while he was in office. After he retired to his private law practice, he had rendered valuable and equivalent services for all the money he received from the Doheny interests. The unfair publicity which followed Doheny's statement, however, probably cost McAdoo the Democratic nomination for the Presidency in 1924. None of the other men named was shown to have given Doheny any favors while he was in office. Ex-Secretary of War Garrison had been employed by a corporation in which Doheny held stock, but Doheny had nothing to do with hiring him. George Creel had worked for Doheny only three months and then had resigned.

when Sinclair was eight years old. After a public-school education, young Sinclair attended the University of Kansas and received a degree in pharmacy. He worked at his profession for three or four years but with the first money he got together began speculating in oil leases. His speculations had been amazingly successful and, at the time of the hearing, Sinclair had acquired through his many affiliations and corporate connections extensive oil interests in North and South America, Europe, Asia and Africa.

Sinclair had already appeared before the committee and testified at length. On his recall he declined to answer any further questions. He did not, as had Fall, base his refusal on his constitutional privilege against self-incrimination; on the contrary, his carefully prepared statement was:

> I do not decline to answer any question on the ground that my answers may tend to incriminate me, because there is nothing in any of the facts or circumstances of the lease of Teapot Dome which does or can incriminate me. . . . I shall reserve any evidence I may be able to give for those courts to which you and your colleagues have deliberately referred all questions of which you had any jurisdiction, and [I] shall respectfully decline to answer any question propounded by your committee.

Chairman Walsh then asked Sinclair a series of questions, to all of which the witness returned the stereotyped reply, "I decline to answer on the advice of counsel."

The committee immediately reported Sinclair's obstinacy to the Senate, which, by a vote of seventy-two to one, declared him guilty of a contempt of the Senate and ordered his prosecution. He was promptly indicted; he gave the required bail of $1,000 and was released pending trial.[11]

Senator Walsh and his committee continued their probings. One of Sinclair's attorneys, Colonel J. W. Zevely, testified that some time in June 1922 Fall told him he needed

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[11] Sinclair's trial on this contempt charge did not take place until much later. He was found guilty and sentenced to three months' jail imprisonment and to pay a fine of $1,000. He promptly lodged an appeal with the Court of Appeals.

$25,000. The lawyer reported this to Sinclair, who said, "If he wants it, give it to him." Thereafter Wahlberg, Sinclair's secretary, deposited $25,000 in Liberty bonds in Fall's account at an El Paso bank. Zeveley said the transaction was a loan and that Fall gave Sinclair a note for the $25,000. There was also testimony that one of Fall's sons-in-law had tried unsuccessfully to induce an old friend of Fall, a Mr. Price McKinney of Cleveland, "to stand for the story" that McKinney had lent Fall $100,000.

Other than the above, most of the information elicited by the committee was sensational only in that it revealed corruption in high political and business circles. Few of the data it accumulated related to the Teapot Dome or Elk Hills leases, or to Fall's, Sinclair's or Doheny's connection with them.

The special counsel, on the other hand, had unearthed facts which, taken with the earlier evidence developed by the committee, gave them air-tight cases against Pan-American Petroleum & Transport Company and Mammoth Oil Company for the cancellation of the Elk Hills and Teapot Dome leases, and ample grounds for seeking criminal indictments against Fall, Doheny and Sinclair for conspiracy to defraud the United States and for the bribing of a public officer.

## The Civil Cases

By March 17, 1924, the government was ready to institute legal procedures to set aside the contract and leases to Doheny's Pan-American Petroleum & Transport Company. The suit was filed in the United States District Court for the Southern District of California. The trial opened October 21, 1924. Messrs. Roberts and Pomerene represented the United States. Frank J. Hogan[12] headed a battery of nine lawyers

[12] Frank J. Hogan, at the time of the trial, was forty-eight years of age. He had graduated from the University of Georgetown School of Law in 1902, and immediately began the practice of law in Washington, D. C. He rose rapidly and was soon recognized as one of the country's ablest trial lawyers. He had participated with notable success in many important trials before his connection with the oil reserve cases. He held many positions of distinction in his profession: lecturer on law in the School of Law of Georgetown University, president of the Bar Association of the District of Columbia, and president of the American Bar Association.

who appeared for the defendant. The Honorable Paul J. McCormick, district judge, presided. There was no jury.

The Government's evidence was largely a repetition of the testimony which had been taken before the Senate investigating committee. Neither Fall nor Denby took the stand, but their testimony and statements before the Senate committee were offered and received in evidence. Doheny was called as a witness for the Government but declined to testify on the ground that his testimony might tend to incriminate him.

After a lengthy hearing and full argument the Court held that the $100,000 paid by Doheny to Fall was a bribe which had induced Fall's conduct and effected the contract and leases between the United States and the Pan-American Petroleum & Transport Company. The transactions, having been consummated through conspiracy and fraud, should be set aside. The Court "stated an account" between the parties, in which it charged the company with all of the oil it had extracted from the reserves, and gave it credit for its expenditures in drilling and operating wells and for its construction of storage facilities and other useful improvements.[13]

There was an appeal to the United States Court of Appeals. That court not only affirmed the judgment of the district court that the contract and leases should be set aside, but also ruled that the company, having entered upon the land illegally, was to be considered a trespasser and as such, not entitled to credit for any of its cash outlays.[14]

A further appeal to the Supreme Court of the United States availed nothing. On February 28, 1927, that court, in a unanimous opinion, affirmed the judgment of the Court of Appeals.[15]

The suit against Sinclair's Mammoth Oil Company to set aside the Teapot Dome lease and contracts was filed in the

[13] 6 F. (2d) 43.

[14] 9 F. (2d) 761. The refusal to credit the company with its cash outlays meant a loss to it of over $10,000,000.

[15] 273 U. S. 456.

district court of Wyoming on March 13, 1924, and came on for trial on March 9, 1925. Appearing for the government were Messrs. Roberts and Pomerene. Martin W. Littleton,[16] of New York City, led a group of eight lawyers who represented the defendant. District Judge T. Blake Kennedy tried the case without a jury.

The evidence which had been given before the Senate committee so far as it related to the transactions between Fall and Sinclair's Mammoth Oil Company was offered and received in evidence. Neither Sinclair, Fall nor Denby testified. Colonel Zeveley, Sinclair's lawyer, was called and repeated the testimony he had given before the Senate committee.

In addition there was new evidence of a most sensational character. It involved a deal by which a surreptitious profit of millions was channeled into a short-lived Canadian corporation and the money or its equivalent made available for shadowy and unrecorded purposes. Its significance in the suit to set aside the Teapot Dome lease and contracts was that it had served as a vehicle to get money into the hands of Fall.

Briefly, these were the facts which the Government's evidence disclosed. On November 15 and 16, 1921, a group of men met by appointment in a New York City hotel room. It was no ordinary group. In their combined interests they represented a large share of the oil, above and below ground, in the Western Hemisphere. There were Colonel A. E. Humphreys, of the Humphreys Mexia and Humphreys Texas Oil Companies; H. M. Blackmer, chairman of the Board of the Midwest Refining Company, a subsidiary of the Standard Oil Company of Indiana; R. W. Stewart, president of the

[16] Martin W. Littleton was a native of Tennessee. At the time he appeared in the Mammoth Oil Company case as attorney for Sinclair, he was fifty-three years of age. He was "self-educated." He was admitted to the bar of Texas in 1891 and practiced there until 1896, when he moved to New York City. From 1900 to 1904 he was an assistant district attorney for King's County, New York, and later a member of the Sixty-second Congress from the First New York District. He became one of New York's foremost trial lawyers and, during nearly fifty years of active practice, led in the trial of an amazing variety of important civil and criminal cases.

Standard Oil Company of Indiana; James E. O'Neil, president of the Prairie Oil & Gas Company; and Harry F. Sinclair, head of the Sinclair Consolidated Oil Corporation and other companies. Standard Oil Company of Indiana and Sinclair Consolidated each owned a half interest in a corporation known as Pipe Line & Purchasing Company.

After a two-day conference, it was agreed that Humphreys would sell to the Continental Trading Company, a corporation to be organized in Canada half of his companies' production, up to 33,333,333 barrels of oil, at $1.50 a barrel. The O'Neil, Sinclair and Stewart companies would then resell the oil for Continental at $1.75 a barrel. O'Neil, acting for the Prairie Company, and Sinclair and Stewart, acting for the Pipe Line & Purchasing Company, guaranteed Continental's performance of the contract. The profits were to be—and were—distributed to Blackmer, O'Neil, Stewart and Sinclair.

Application for the incorporation of the Continental Trading Company was made to the Secretary of State for the Dominion of Canada at the conclusion of the second day of the conference. The corporation was a mere shell. All of its financial transactions were handled by the New York agency of the Dominion Bank of Canada.

The contract went into effect immediately. By the first of the following June, more than $3,000,000 "profit" had been put into its treasury. With this money the company, acting through Henry S. Osler, a Toronto lawyer, purchased $3,000,000 of United States Liberty bonds.

So far the negotiations were successful, but the increasing and spreading heat generated by the Senate committee's investigations induced a change of plan. As soon as its assets had been exhausted by the purchase of the bonds, the Continental corporation was voluntarily dissolved and every record of its eighteen months' activities destroyed.

The Government wanted to question the partners of the Continental Trading Company, but had little opportunity to do so. Humphreys and his counsel did appear, but they could

not remember who had been financially interested in the corporation. Blackmer and O'Neil departed for France before a subpoena could be served on them. On application of the Government, letters rogatory were issued but the "tourists" refused to testify. A subpoena issued for Stewart was returned to the marshal—"party not found." The Government tried to take the deposition of Osler, the Toronto lawyer who had organized the trading company and purchased the bonds, but he refused to testify on the ground that to do so would breach a confidential relationship between attorney and client. By the time the highest court in Canada had ruled against him on that question the trial in Wyoming was over, and the district judge refused to reopen the case for additional testimony.

Notwithstanding the difficulties put in their way, the Government counsel did succeed in proving that a year before the $25,000 in Liberty bonds had made their way from Wahlberg to Fall's bank account in El Paso, $230,500 in Liberty bonds had been turned over by someone to Fall's son-in-law, M. T. Everhart. Some $200,000 of these were conclusively shown by their serial numbers to have been included in the lots of bonds purchased by and receipted for by Osler, the Canadian attorney, for Continental Trading Company.

Everhart turned over to the First National Bank of Pueblo $90,000 of these bonds to be kept for Fall. The remainder, $140,500, was transferred to the Thatcher Estates Company to satisfy loans made by that company to Fall, Everhart and a cattle company in which they were jointly interested.[17]

Everhart was called as a Government witness, but invoked the rule against compulsory self-incrimination and refused to testify.

[17] It was revealed later in the Senate hearing that Osler, after deducting two per cent for himself, disposed of the proceeds of all of the Liberty bonds purchased with Continental Trading Company's profits as follows: to H. M. Blackmer approximately $763,000; to James E. O'Neil approximately $800,000; to Robert W. Stewart approximately $759,000; and to Harry F. Sinclair approximately $757,000. There was also testimony that Blackmer, O'Neil, Stewart and Sinclair at much later dates accounted to their respective companies for their receipt and dispositions of these bonds.

On the record the case against Sinclair's Mammoth Oil Company looked stronger than the one made against Doheny's company. The district judge, however, held the Mammoth Oil Company transaction was authorized by law and that there was no fraud intended or perpetrated against the United States. He dismissed the suit for want of equity.[18]

The Government promptly appealed. The Court of Appeals reversed the district court and directed it to enter an order cancelling the lease and subsequent contracts as fraudulent, enjoining the oil company and its lessees from further trespassing on the leased land and calling for an accounting of all oil and other petroleum products taken out of the reserve under the lease and contracts.[19]

The oil company then prosecuted an appeal to the Supreme Court. On October 10, 1927, that court handed down its opinion. It followed the precedent it had set in the earlier Pan-American & Transport Company case and held that the lease and contracts were made fraudulently by means of collusion and conspiracy between Fall and Sinclair and should be set aside. The Mammoth Company was ordered to account for all oil removed from the reserve and was denied credit for any of its expenditures for drilling and operating wells and constructing pipe lines and storage facilities.[20]

The victory of the Government in the civil suits was complete. The valuable naval oil reserves were recovered for future protection in the interests of all the people of the United States.

## The Criminal Cases

In the criminal prosecutions, which were based on the same evidence which had been effective in the civil litigation, there was a different story.

On June 5, 1924, the Supreme Court of the District of

[18] 5 F. (2d) 330.
[19] 14 F. (2d) 705.
[20] 275 U. S. 13, 48 S. Ct. 1, 72 U. S. (L. Ed.) 137.

Columbia returned four indictments: one against Fall and Doheny, charging them with a conspiracy to defraud the United States; one against Fall and Sinclair, charging them with a conspiracy to defraud the United States; one against Fall, charging him with bribery; and one against Doheny and his son, charging them with bribery. The defendants and their respective lawyers joined forces to attack the indictments on technical grounds. It was successful. On April 13, 1925, all were declared faulty and dismissed. This initial victory for the defense was, however, a hollow one. On May 27 all of the defendants were reindicted and were charged with the same crimes as before, but in more appropriate language.

The first of the criminal cases, *United States v. Edward L. Doheny and Albert B. Fall*, came on for trial in the Supreme Court of the District of Columbia on November 22, 1926. The Honorable Adolph A. Hoehling presided. Messrs. Roberts and Pomerene, the Government's special counsel, were the chief prosecuting attorneys. They were assisted by United States District Attorney Major Peyton Gordon and his staff. The defendant Doheny was represented by Mr. Frank J Hogan, who was assisted by the members of the regular legal staff of the Pan-American Petroleum & Transport Company. Fall was represented by three lawyers: Mr. Henry A. Wise, former United States Attorney for the District of New York; Mr. Wilton J. Lambert of the Washington bar, and Mr. Mark Thompson of the New Mexico bar.

In a courtroom crowded to its capacity the qualifying examination of the summoned veniremen began. Less than three hours were consumed in selecting the jury.

Mr. Roberts' opening was forceful. In less than half an hour he concisely outlined the Government's claim: A highly placed Federal official had been bribed by one of the country's richest men to surrender illegally and without adequate consideration valuable properties and rights of the Federal government.

Mr. Hogan then rose to describe in minute detail the evidence that would be produced to refute the Government's

claim against his client, Doheny. The defense attorney promised that the jury would be shown that Doheny was "an honest, patriotic citizen who had responded to the call of the Navy officials to help the government," and that Fall was "a man who had devoted his life to public service."

Mr. Lambert, speaking for Fall, announced that he would postpone a statement of the intended proof of Fall's innocence until the Government had rested its case.

The Government then called more than fifty witnesses,[21] many of whom testified as to more or less formal and undisputed matters. A dozen or more identified the record of the proceedings of the Senate investigating committee and of the documents, memoranda and letters accumulated during its investigation. Six more witnesses identified the location and character of the oil reserves and other lands which would be mentioned in the later testimony. These also gave their opinions on the threat of drainage which, supposedly, had prompted the leases. All said they did not believe such a threat existed.

Several witnesses were called to trace the congressional and departmental policy on the oil reserves from 1909, when President Taft withdrew the first of the oil-bearing lands from disposition to private persons or companies, to May 31, 1921, when President Harding transferred the administration of the oil reserves from the Department of the Navy to the Department of the Interior.

The oaths of office taken by Secretaries Fall and Denby were offered in evidence and read to the jury.

The Court, over the violent protests of defendant's counsel, admitted in evidence the testimony and statements which Fall and Doheny had given before the Senate committee.

To establish the importance of the naval reserves which had been leased to Doheny's company, Dr. George Otis Smith, of the United States Geological Survey, testified that Reserve Number One, Elk Hills, was estimated to contain 250,000,000

[21] The exact order in which the witnesses were called has been disregarded.

barrels of oil. Smith said that it was "the largest unappropriated tract of oil-bearing land in America."

The general nature and the seriousness of the alleged crime of the defendants having been established, the prosecution next called to the stand witnesses to testify to the peculiar financial history of Albert B. Fall. One of the principal witnesses on this point was Mr. Will E. Harris of Carrisso, New Mexico. Harris, under the quiet examination of Mr. Pomerene, said that he was one of the former owners of the Harris ranch which adjoined Fall's Three Rivers ranch. He told that in late 1921 he and his associates had agreed to sell Fall their ranch for $91,500. Early in December he met Fall by appointment in El Paso, Texas, in the office of Fall's son-in-law, C. C. Chase. Fall brought with him a handbag which contained $10,000 in $100 bills, and gave this money to Harris as a down payment. Later, as title to specific portions of the property was cleared up, Fall made four additional payments of $23,000, $22,000, $20,000 and $16,500 each. These payments were made by cashier's checks issued by the Citizens National Bank of El Paso, Texas.

When cross-examined by Mr. Hogan, Harris stated that Fall had made no attempt to keep the transaction secret.

Mr. Harris was corroborated by an officer of the Citizens National Bank of El Paso, who identified the cancelled cashier's checks which Fall had used in the final payments for the land, and also by persons present at the closing of the sale. Fall's son-in-law, C. C. Chase, in whose office the deal had been negotiated, said that Fall had brought $100,000 in cash from Washington and had deposited it in Chase's safe at El Paso for temporary safekeeping. At first Fall had not explained where he had obtained the money, but later he said he had borrowed it from Mr. Doheny.

Chase testified further that he had made a trip at Fall's request to Cleveland, Ohio. The witness explained that in December of 1920 Fall had discussed his intention of buying more ranch land with Mr. Price McKinney of Cleveland. McKinney had offered to supply as much as $250,000 to

finance the purchases. In December 1923, Fall had sent Chase to Cleveland merely to find out whether McKinney remembered making the offer and not, insisted the witness, to ask McKinney to say he had actually lent money to Fall.

United States Senator Irvine Lenroot of Wisconsin next took the stand. He had been chairman of the Senate Committee of Public Lands during part of the investigations of the oil leases and he had, with Senator Reed Smoot of Utah, called on Fall at his Wardman Park apartment shortly before Christmas of 1923. They found him in bed. The purpose of the visit was to tell Fall he owed it to the committee and to himself to come to Washington and explain where he had obtained the money with which to buy the Harris ranch. Fall, said the witness, told him that it was an ordinary, private business transaction and had no bearing on the Senate investigation but he would willingly disclose all the facts except the name of the person from whom he got the money. Lenroot insisted that Fall should tell the whole story, and Fall then offered to tell him in confidence the name of the man. Lenroot said he declined the confidence, but Fall proceeded to give him the name of Edward B. McLean, and told him he would wire McLean for his permission to disclose his name to the committee. Fall also said his health was so bad he doubted whether he would be able to appear before the committee, but promised to send a statement.

Edward B. McLean was then called to testify. He said he had known Fall intimately for a number of years. Sometime during the autumn of 1921 Fall had proposed to him a partnership in a ranch project in New Mexico. In corroboration of this statement McLean produced a long letter dated November 3, 1921, in which Fall described the property he wanted to buy with McLean and explained its possibilities. McLean also presented a copy of his reply to Fall's letter. It was dated a week later, began "Dear Albert" and stated that for financial reasons he could not go into the deal—that "after [he] got through paying seventy-five per cent of his income

to the government, [he] had nothing left for investment." The letter was signed "Ned."

McLean said that he and Fall had had another conversation in Washington late in November. At this time Fall asked for a loan of $100,000. McLean then repeated the testimony he had given before the Senate committee: He agreed to loan Fall $100,000 and gave him two or three checks aggregating $100,000 on Washington banks. Fall gave him a note for the amount and a memorandum which was in effect an option to McLean to buy an interest in the Harris ranch. The checks, said McLean, were never cashed, but were returned to him within two or three days with the explanation that Fall had arranged to get the money from another source.

McLean described still another meeting with Fall. This time they met at the Ritz Carlton Hotel in Atlantic City in December of 1923. Fall asked, "Ned, do you remember the transaction and negotiation we had in 1921?" McLean said he did, and then Fall asked, "Would you mind saying that you loaned me that money in cash? Some of my political enemies are deviling me, and it would be a great assistance to me." McLean admitted he agreed to do it.

McLean said that shortly after his talk with Senator Walsh in Florida he saw Fall and told him that he "was going to be put under oath and would have to tell the things exactly as they were and he [Fall] of course would have to tell them exactly as they were." Fall, said McLean, answered, "Certainly."

McLean said that about an hour after he had testified under oath he met Fall who showed him a telegram addressed to Edward L. Doheny. The telegram read: 'McLean examined by Walsh today. Facts possibly developed. I will or may be examined myself. Names not necessarily disclosed."

After McLean had left the stand Senator Thomas J. Walsh identified a letter he had written to Fall on January 11, 1924, which was immediately after McLean had admitted before the Senate committee that he had not lent Fall the $100,000.

Walsh's letter requested Fall either to appear before the committee or to submit a statement on McLean's testimony. Fall's reply, which was introduced as evidence, admitted that McLean had told the truth. It did not say from whom the money had come, but did say it was not from Sinclair or anyone else involved in the oil transactions.

The Government next proceeded to show from whom and in what manner Fall had received the money. First the $100,000 note, dated November 30, 1921, which Fall had given to Doheny and from which Doheny had torn Fall's signature was offered and received in evidence. Then Graham Young, treasurer of Blair & Company, New York bankers, testified that he had arranged to get $100,000 in currency for Edward L. Doheny, Jr., on November 30. He said he delivered it to young Doheny, who put it in a small brown valise.

The Government next entered its attack on the strange circumstances in which the oil lands were leased.

Josephus Daniels, Secretary of the Navy under President Wilson, stated that although he had, while he was in office, received many applications for leases on the oil reserve lands, he had neither made such leases nor seen any need for them.

Former Attorney General Harry M. Daugherty was next sworn in as a Government witness. When Daugherty had followed the victorious Harding to Washington he had been a smiling, ebullient glad-hander. Time had wrought great changes, for the ex-cabinet officer who now took the stand was an aged and grave man. He could not recall ever having seen the contract or leases of the California reserves or being asked for an opinion concerning them.

Daugherty's cross-examination failed to refresh his memory. He knew nothing of the Presidential executive order of May 31, 1921, by which the handling of the oil reserves had been transferred to the Department of Interior. He had no recollection of ever participating in any discussions about the reserves. He might, he said, have told Fall or Denby or anyone else informally that the oil exchange policy was justified, but he had never given an official opinion to that effect.

The Government offered in evidence a letter, dated October 25, 1921, from Denby, Secretary of the Navy, to Fall. One part of the letter read, "The Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition, *or otherwise.*" This letter had been submitted to and approved by Fall before it was officially transmitted to him, and it was testified in court that the underscored words *or otherwise* had been inserted at his suggestion.

E. C. Finney, the Assistant Secretary of the Interior, who signed for the Department the contract dated April 25, 1922, between the United States and the Pan-American Petroleum & Transport Company, was questioned for two full court days. After the transfer of the oil reserves from the Navy to the Interior Department he, under Fall, had been in charge of the Department's relations with the Navy and negotiations with the various oil companies.

As early as the fall of 1921, said Finney, officials of the Navy Department, the Bureau of Mines, the Geological Survey and Fall and himself discussed the threat to the naval reserves from the privately operated wells on the edges of the reserves and the desirability of leasing certain parts of the Elk Hills reserves for the construction of protective "off-set" wells. In these discussions, said Finney, the Navy representatives insisted—and the others agreed—that in the interest of the national defense storage facilities should be constructed at Pearl Harbor in the Hawaiian Islands. The fuel oil kept there would be for future use by the Navy; it would be obtained through an exchange of crude oil from the reserves.

Fall, according to Finney, was absent from Washington during practically all of December 1921, but activities respecting the provision of oil storage facilities at Pearl Harbor continued. The witness identified a letter, dated December 9, 1921, from Assistant Secretary of the Navy, Theodore Roosevelt, Jr., who signed himself "Acting Secretary." In this letter Roosevelt referred to the Pearl Harbor plan and asked the Department of the Interior to consider the matter in as confi-

dential a manner as possible because of its relation to the national defense.

Another letter from Secretary Denby to Secretary Fall, dated December 14, was identified by Finney and received in evidence. In it the Secretary of the Navy said his Department wished the Department of the Interior to proceed at once to handle the storage construction and exchange. Finney said he wired Fall when he received the letter and told him of the Navy's request. Fall's reply directed Finney to proceed.

When Fall returned to Washington in January he informed Finney of a more definite plan of constructing facilities at Pearl Harbor for the storage of 1,500,000 barrels of fuel oil and securing this fuel oil through an exchange of crude oil taken from the Elk Hills reserves. Fall told Finney he had already discussed the probable cost of the construction of the storage space with Doheny, and he handed Finney a memorandum which he said contained Doheny's figures. Fall also said he expected to be busy on other things and wanted Finney and Dr. H. Foster Bain, head of the Bureau of Mines, to supervise the preparation of the proper plans and specifications for the work and the securing of bids.

Finney, following his superior's orders, sent out proposals for bids on the Pearl Harbor construction project. There was no public advertising. Invitations to bid apparently were sent only to the Pan-American Petroleum & Transport Company, the Standard Oil Company of California, the Associated Oil Company, General Petroleum Company, Pacific Oil Company and the J. G. White Engineering Company.

The plans and specifications, as finally drafted, called for the construction at Pearl Harbor of storage facilities for 1,500,000 barrels of oil on a fixed sum and on a cost-plus basis. That amount of fuel oil was to be delivered to Pearl Harbor in exchange for crude oil of equivalent value to be taken from the Elk Hills reserves. Two or three days after the proposals were sent out representatives of the Navy Department advised the Department of the Interior that the Navy objected to the cost-plus feature, and letters and telegrams were sent to the

prospective bidders to ignore that feature in their proposals.

Representatives of two of the companies which were asked to submit bids replied that they would not bid because they had been advised that the proposed contract was illegal under existing legislation.

Early in April 1922, Fall asked Finney when the contract would be closed. Finney testified that when he answered "not before April fifteenth" Fall seemed disappointed, and said he wanted it closed at the same time as "the other matter [the lease of the Teapot Dome reserve]."

Finney told of the measures that were taken to insure secrecy. He identified a letter from Fall to Denby, dated April 12, 1922, in which Fall said among other things that there should not be full publicity concerning negotiations for the construction of the storage facilities at Pearl Harbor. Then Finney identified the interdepartment memorandum he himself issued and circulated to the various bureau heads in his Department. The memorandum stated that it was the general policy of Secretaries Denby and Fall that bureau officials were not privileged to give out any information concerning the contract.

The bids were due to be and were opened April 15. On April 17, Finney testified, Denby asked for complete publicity on the negotiations. Finney wired Fall, who replied on the following day and authorized Denby to announce the results of the bidding and the awarding of the contract.

Fall, said Finney, was not present in Washington when the bids were opened. The representatives of the Navy and Interior Departments who were present when the bids were examined unanimously decided that an "alternate bid" submitted by the Pan-American Petroleum & Transport Company was the "best bid." The contract was awarded to that company.

This alternate bid was the one which contained the so-called preferential clause which permitted the subsequent leases of June 5 and December 11, 1922, to be given to the Pan-American Company without competition. These later

leases, for all practical purposes, signed over the reserves on a royalty basis in perpetuity to Doheny's company. No suggestion of such a preferential clause was contained in the plans and specifications and no other bidder included such a condition in his proposal.

Mr. Finney was cross-examined by Mr. Hogan on behalf of Doheny and by Mr. Mark Thompson on behalf of Fall. The questions of both were designed to show that regularly designated officials of the Navy and Interior Departments prepared the plans and specifications and negotiated for the bidding—Fall, they sought to prove, had practically nothing to do with the matter. Finney admitted that he telegraphed Fall that he had decided the Pan-American bid was best and that Arthur W. Ambrose, former chief petroleum technologist in the Bureau of Mines, and Admiral John K. Robison, in charge of the contract negotiations for the Navy Department, concurred in his decision. He also admitted that soliciting bids privately rather than publicly was a policy adopted by the Department after Assistant Secretary of the Navy Theodore Roosevelt, Jr., had advised the Department of the Interior to handle bids as secretly as possible because the war plans of the Navy were involved. Finney also revealed that between January and the time the contract was let he discussed the proposed oil exchange with Fall on several occasions and both he and Fall were satisfied of its legality.

Colonel Theodore Roosevelt, Jr., took the stand to account for his part in the oil-lands negotiations. He described the Pearl Harbor project as "an essential part of the Navy's plan of defense," approved by both the Secretary of the Navy and the Navy Board. He explained it was not customary to give publicity to defense projects before construction, but admitted that prior to 1922 it had been customary to advertise publicly for bids, and of course, in such circumstances the projects were described and knowledge of them became public property. He said he had never discussed the leasing of the reserves with Denby or Robison; he had not discussed with them or any one else the contract of April 25, 1922, between the

United States and the Pan-American Petroleum & Transport Company.

A number of witnesses—representatives of oil companies—declared that they had written Fall, as Secretary of the Department of the Interior and asked to be considered as bidders but had been ignored. One of them testified he had not heard of the lease of December 11, 1922, until after its execution; had he known of it in time would have welcomed an opportunity to have put in a competitive bid.

Rear Admiral John Halligan, chief of the Naval Bureau of Engineering, testified he opposed and protested the execution of the contract and leases to the Pan-American Company.

An accountant from one of the government offices had examined the records and computed the profit made by the Pan-American Petroleum & Transport Company on the contract for the construction of the storage tanks at Pearl Harbor. He stated that the profits were $791,000.

The contract of April 25, 1922, and the lease contracts of June 5 and December 11, 1922, were read to the jury. Also admitted were various leases with other oil companies which showed that the oil royalties payable to the United States in such contracts were greater than those fixed in the Elk Hills reserve leases.

With the reading of the contracts the Government rested its case. Mr. Lambert made an opening statement on behalf of Fall. It was largely repetition of Mr. Hogan's earlier statement in behalf of Doheny.

The first witness to the essential facts called by the defense was Dr. H. Foster Bain, former head of the Bureau of Mines. Under Mr. Hogan's skillful and carefully prepared direct examination Dr. Bain revealed that Finney, Robison, Ambrose, and himself and others had begun conferring on the threat of drainage from the California reserves and on the necessity of leasing certain parts of the reserves "for off-set protection" early in 1921. They had also, said the witness, discussed the desirability of constructing oil storage facilities at Pearl Harbor and the possibility of storing fuel oil there which would

be obtained in exchange for crude oil taken from the reserves.

Dr. Bain testified that in November of 1921 he talked with Fall about the problem and Fall said he had asked Doheny to find out from his engineers what a million and a half barrels of stored tankage would cost. Doheny had promised to get the information. Then Fall handed Bain a paper which he said contained Doheny's figures and directed him to work out a plan under which storage facilities could be constructed and an exchange of crude for fuel oil effected.

A letter, dated in November 1921, from Finney, Assistant Secretary of the Interior, to the Secretary of the Navy was produced and offered in evidence. It recited that the Judge Advocate General of the Navy had rendered an opinion that the proposed exchange of crude oil for fuel oil was legal. Bain said that the letter satisfied both Fall and Finney on the question of legality and neither saw any reason to ask the Attorney General for an opinion.

Bain said he talked with representatives of various oil companies about the Pearl Harbor project and cautioned them to secrecy. Among these was Mr. J. J. Cotter, general counsel for the Pan-American Petroleum & Transport Company.

Bain did not recall any meetings with Fall in December, but in January he made a trip west and on the twenty-second stopped off at Fall's ranch at Three Rivers, New Mexico. He took with him a set of the plans and specifications for the Pearl Harbor construction and showed them to Fall. Fall, he said, had never seen them before. Fall merely looked at them casually and said they were all right. Bain then proceeded to Los Angeles where by previous arrangement he met Doheny, Cotter and a vice-president of the Pan-American Company named Anderson. He said he placed the plans and specifications before them, "explained the confidential nature" of the project and asked them to make a bid. In the same interview he gave them the names of other oil companies which he said he intended to ask for proposals. Thereafter he submitted the plans and specifications to the Standard Oil Company of California, General Petroleum Corporation, Pa-

cific Oil Company, Associated Oil Company and the Union Oil Company. The officials of the General Petroleum, said Bain, thought the proposed contract was not authorized by existing law and refused to bid. A representative of the Union Oil Company declared the company was not interested in the proposition as presented. The other companies promised to give the matter their consideration.

Dr. Bain stated further that late the following January or early February Fall told him that he was too busy with other matters to handle the transaction and that Bain and Finney should complete the arrangements. He and Finney, said the witness, considered advertising for bids and decided that since there was no law requiring it, it would be better, in this particular situation, not to do so. Therefore Finney opened the bids on April 15, 1922, in the presence of Cotter, the Pan-American Company representative, Mr. Dunn, the president of the J. G. White Company, Ambrose, the government's chief petroleum technologist and himself. After the bids were opened Finney turned them over to the witness and Ambrose for analysis.

When Mr. Roberts subjected Bain to an exhaustive cross-examination the witness admitted that Fall told him in early November of 1921 (the month the $100,000 loan was made) that he expected a communication from Doheny. He also admitted that in the early conferences Finney had insisted there should be some competitive bidding. Furthermore, he stated that Fall knew and approved of the oil companies he proposed to see in Los Angeles in January 1922, and invite to bid.

The witness was confronted with and embarrassed by two of his own letters. One he had written on January 25, 1922, to Assistant Secretary of the Interior Finney; in it he suggested that it might be well to get an opinion from the Solicitor of the Department of the Interior, "informally at least." The other was dated May 12, 1922, and addressed to Fall at Three Rivers, New Mexico. In it Bain referred to the contention made by the Pacific Oil Company that they had been advised the con-

tract was illegal. Bain wrote that while it was not a matter with which the Department was concerned

because we have all been entirely clear in our minds as to the right of the government to make the exchange, and have made a contract with a responsible concern . . . there is another phase of it. None of us want Mr. Doheny to get into any trouble, and I take it we will want to do anything to make it easy for him. Out of all of this has come the suggestion repeatedly made that the opinion of the Attorney General be obtained as to the legality of the contract. I realize the objection to asking such an opinion but I have thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put into writing what I have understood was his informal and verbal expression of opinion favorable to the action the Department has taken.

Rear Admiral Luther E. Gregory, chief of the Bureau of Yards & Docks, Navy Department, testified that he, in consultation with other Navy men, drew the plans and specifications for the proposed storage facilities at Pearl Harbor.

Gano Dunn, president of the J. C. White Engineering Company, testified that he prepared the main and alternate proposals for the Pan-American Company. He said further that Mr. Cotter, counsel for the Pan-American Company, insisted that the contract should be signed by both the Secretary of the Interior and the Secretary of the Navy.

Mr. Roberts' cross-examination of Dr. Bain had already disclosed that Dr. Bain had introduced Dunn to Cotter and had recommended that the White Company should be employed to do the engineering work for the Pan-American Company.

Retired Navy Admiral John K. Robison was an important witness for the defense. He had known the Dohenys, father and son, for many years. Robison said that long before 1921 he had talked with the elder Doheny about the California naval reserves. Doheny had said then that the United States

ran a grave risk of losing all the oil in the reserves through drainage into adjacent private wells.

When Robison became Engineer in Chief of the Navy Department in October of 1921, he was almost immediately given charge of all fuel oil matters by Secretary Denby. Robison said he promptly conferred with Fall, Finney and Dr. Bain. All three agreed the threat of drainage was serious. They told Finney of the plan to develop the reserves so that the Navy could get something out of them. Fall commented at the time that it was a situation to which the Navy had been blind.

The witness described a talk he had with Doheny late in 1921. Doheny reported that his associates in the Pan-American Company did not want him to enter into any arrangement with the government for the Pearl Harbor construction. Robison tried to persuade Doheny that he should bid for the contract because of the increasing threat of a Pacific war. Robison pointed out that Pearl Harbor could play a vital part in any such conflict, and that the national defense and the security of the Pacific coast could well depend on the establishment of an adequate supply of fuel oil in the Hawaiian Islands. Doheny, insisted Robison, had had great experience in oil production and conservation and was in a unique position to render a valuable service to his country. Doheny, said the witness, was convinced by this argument and said, "You are right. You can go ahead confidently and count on one bid at least." Doheny then added that a bid from his company would not involve a dollar of profit to him.

Admiral Robison further testified that between April 17 and 25, 1922, when the contract with the Pan-American Company was signed, Mr. Cotter called attention to the preferential clause in the company's alternate proposal and questioned its desirability. Both Robison and Mr. Ambrose assured Cotter they believed the provision was in the national interest.

Robison also asserted that a draft of the contract was submitted to Secretary Denby and the Solicitor and the Judge

Advocate General of the Navy Department. Denby suggested some changes in the contract, which were accepted. Denby, said the witness, reread the contract in its final form and signed it in his presence.

In his cross-examination of Robison Mr. Roberts was bitter and sarcastic. He stressed that Robison had agreed with Fall in October of 1921 that the project should be kept as secret as possible. Robison replied that the secrecy was in accordance with the Navy's declared policy and denied that the purpose of the concealment was to prevent Congress from learning of the proposed action. Mr. Roberts belittled the so-called "war scare" by pointing out that the Four Power Naval Treaty, limiting the naval armaments of England, Japan, France and the United States, had been signed on December 13, 1921, and ratified by the United States Senate on March 24, 1922, a full month before the signing of the Pan-American contract.

When Arthur W. Ambrose, the government's chief petroleum technologist, took the stand he corroborated Dr. Bain on the incidents of the trip to Los Angeles in January of 1922 and the approach to representatives of the oil companies who were invited to submit bids. He said that after the bids were opened he and Bain made a study and analysis of them and recommended that the alternate bid of the Pan-American Company should be accepted as the lowest and best bid. He swore that neither Fall, Finney nor anyone else dictated his report; his recommendation represented his uninfluenced and honest judgment.

There was a stir in the crowded courtroom when ex-Secretary of the Navy, Edwin Denby, took the stand. But if the crowd anticipated a repetition of the confusion and embarrassment which had accompanied Denby's examination before the Senate committee they were doomed to disappointment. Denby gave prompt and forthright answers and was an excellent witness. He told of his graduation from the University of Michigan, his three-term services as a member of the National House of Representatives, his military rec-

ord—in World War I, at the age of forty-seven, he enlisted in the Marine Corps as a private and rose through intermediate grades to the rank of major—and his appointment in 1921 as Secretary of the Navy.

Almost immediately after he assumed the cabinet office, he said, he began receiving alarming information about the drainage of the California reserves. This information worried him for he knew the Navy had no facilities for handling such a situation. Because he knew the Department of the Interior had such facilities, he requested aid from Secretary of the Interior Fall. Together they submitted the problem to President Harding. Denby asked the President to issue an order putting the reserves under the jurisdiction of the Interior Department. The President thought the plan a good one and directed Denby and Fall to prepare a suitable order for his signature. A draft of such an order was prepared in the Department of the Interior and submitted to Denby. He showed it to and discussed it with Assistant Secretary Roosevelt and other officials of the Navy Department. Some of the Navy men objected to the transfer. Others suggested changes in the language of the order, and the changes were made to satisfy the objections. The order, as modified, was submitted to and signed by the President.

As soon as the order was issued, Denby said, he participated in a number of discussions concerning the desirability of installing facilities at Pearl Harbor for the storage of fuel oil obtained by an exchange of crude oil from the reserves. Denby said he got an opinion from Rear Admiral Latimer, Judge Advocate General of the Navy, that such an exchange was legal. Then he directed Admiral Robison to supervise the preparation of plans and specifications and to have a contract to carry the project into effect drawn up. Thereafter Robison kept him fully informed of the progress being made.

Up to this time, said Denby, he had never met Doheny or heard of the Pan-American Petroleum & Transport Company. No one represented Doheny or the Pan-American Company at any of the conferences he described.

Denby said he was shown a first draft of the contract; he read it over and suggested a number of changes. He afterward read enough of the final draft to assure himself that the changes he had suggested had been made. Only then did he sign it. It was when he signed the contract that Denby first met Doheny. He said he met Doheny again when the lease of December 11 was signed, but did not discuss with him the terms of the document. Nor, he said, did he ever discuss the lease of December 11 with Fall.

Mr. Roberts' cross-examination of Denby was vigorous and persistent. He took up in detail Denby's replies to the questions which had been asked him by Senator Walsh and other members of the Senate committee. How was it, Roberts asked the witness, that at the time of the Senate hearings, when the events were recent, he had been unable to recall any of the details connected with the Elk Hills contract? Denby answered that he had just been released from the hospital where he had been treated for a painful illness and that he was called to testify before he could refresh his memory from documents and correspondence which related to the matter. Since then, he said, he had consulted those records and was now testifying from a refreshed recollection.

Next Mr. Roberts confronted Denby with a report of the Navy Council, dated October 18, 1921, which showed that Denby had said he wanted to have the Interior Department handle the reserves in the best interests of the Navy. The relevant portion of the report read: "[the] matter of leasing is the most difficult and dangerous [thing] to be done. It is full of dynamite, and I do not want to have anything to do with it."

"What did you have in mind when you made that statement?" demanded Mr. Roberts.

"I think what happened to me is a pretty good answer to what was in my mind," answered Denby. He was then allowed to leave the stand.

Joseph A. Carey, one of Denby's executive assistants, testified that when the December 11, 1922, lease was signed

Doheny asked that a public announcement of it be made immediately.

Rear Admiral Cole, United States Navy Commandant at the Norfolk Navy Yard, and Rear Admiral Coontz, former Commander in Chief of the United States Fleet, testified to the strategic importance of the Hawaiian Islands as a naval base, and the imperative essential that a large quantity of fuel oil—"the life blood of the Navy"—be stored there.

Mrs. Edward L. Doheny, whom a contemporary newspaper reporter described as "smiling, youthful and unembarrassed," was sworn. She said her husband told her sometime in 1920 or 1921 that he had promised Secretary Fall a loan of $100,000 so Fall could purchase a ranch which adjoined his New Mexico property. Her husband instructed her to lend Fall that amount if anything should happen to him. Later on, she said, her husband showed her Fall's note and explained he had make the loan. Then, saying he was afraid that if anything should happen to them their executor would insist that Fall immediately pay the note, which was payable on demand, her husband tore Fall's signature from the note. He handed it to her and told her to keep it in a safe place. He would keep the body of the note among his papers. Thus they would protect Fall, who might otherwise be ruined financially. Mr. Doheny also told his wife that their son Edward knew all about the loan and could always get a new one from Fall if that became necessary.

When asked what had become of the signature, Mrs. Doheny said she put it in her safety deposit box at the Security Trust & Savings Bank in Los Angeles. At the time of the Senate hearing she had forgotten where she had put it, but since then she had found it. She promptly produced the torn piece of the note and identified Fall's signature on it. Mr. Hogan dramatically demonstrated to the jury that the piece fitted perfectly the torn line of the main body of the note which had previously been offered in evidence by the Government.

Mrs. Doheny was not cross-examined.

Edward L. Doheny, Jr. followed his mother on the witness stand. He testified he had known Fall as one of his father's friends for many years. Sometime in November of 1921 his father told him he had offered to lend Fall $100,000 because Fall wanted to buy a ranch adjoining his New Mexico property. On Monday, November 30, said the witness, Fall telephoned the Dohenys at New York and said he had completed arrangements to buy the ranch property and would like to have the money. Over the telephone the elder Doheny asked Fall how he wanted the money. When he had hung up the receiver he asked his son to call Blair & Company of New York and find out what his balance was. Young Doheny did so and was informed that his father had only from $10,000 to $11,000 in his account. The witness then told his father he had more than $100,000 on deposit with Blair & Company and would draw a check on his account for which his father could later reimburse him. The elder Doheny agreed to this. He directed his son to draw a check on his account for $100,000, cash it and take the currency to Fall at Washington. Young Doheny followed his father's instructions. Accompanied by his secretary—a man named Plunkett—he took a train for Washington the same day. At Fall's Wardman Park Hotel apartment, Doheny took the money from a bag he carried and counted it out on a table. Fall wrote out a promissory note for the amount in his own hand and handed it to the witness. Young Doheny called Fall's attention to the fact that the rate of interest was not stated, and Fall replied that the rate had not been discussed; Doheny, Sr., should fill in whatever rate he thought was right. Young Doheny then returned to New York, reported to his father what had happened and gave him the note.

Again there was no cross-examination.

Edward L. Doheny, Sr., then took the stand in his own defense. He said he had known Fall since the middle 1880s when they had both been prospectors. Later they had both become lawyers and had had common interests in Mexico. They had maintained a close friendship through the years.

Doheny said his Pan-American Petroleum & Transport Company was organized in 1916; it took over the Mexican Petroleum Company and other properties in which Doheny was interested.

Doheny testified that during World War I he had performed a number of patriotic services. The United States was desperately short of oil tankers so he offered the Navy all of the tankers the Pan-American Company had. The offer was accepted. Doheny said he was also a member of the National War Service Council and the Council for National Defense. These activities kept him in Washington a great deal of the time so that during the war he saw a great deal of Senator Fall.

Doheny repeated the oft-told story of the $100,000 loan. Fall had told him that he was trying to interest some people in a partnership in the ranch and mentioned Price McKinney and another whose name Doheny had forgotten. Doheny promised Fall that if his other plans fell through he, Doheny, would lend it to him. He related the conversation he had with his wife when he made the loan.

Later, on November 30, 1921, Fall telephoned Doheny from Washington, and said he was ready to close the deal and wanted to know whether Doheny would send him the money. Doheny said he would and asked him how he wanted it. Fall answered, "in cash" because it was a cash deal and the currency would be more convenient than a check. Nothing was said about the interest.

Doheny recounted how he had arranged for the money and sent his son to Washington to deliver it. He corroborated Mrs. Doheny on his later conversation with her about Fall's note and about his tearing the signature from the note and entrusting it to her safekeeping. One new item was added—in the spring of 1925 Fall voluntarily assigned to Doheny as security for the $100,000 note thirty-three shares of the capital stock of the Three Rivers Cattle & Land Company, which had taken title to the Fall and Harris ranches and to the improvements and cattle on them. The thirty-three shares, said Doheny, was one third of all of the capital stock and repre-

sented value of $200,000—double the amount of the $100,000 note.

Doheny testified that as an oil prospector he had known in a general way of the Elk Hills and Buena Vista reserves for many years, but had no intimate knowledge of them until 1921. In late October or early November of 1921 Fall first mentioned to him that the government wanted fuel oil and storage space for it. Fall knew that the Doheny companies had constructed such storage facilities in Mexico, and asked him for an estimate of what it would cost to erect thirty 50,000 barrel tanks at Pearl Harbor. At the same time Fall explained that if the plan was carried out it would have to be paid for in crude oil taken from the California reserves.

Doheny agreed to get the information and later did get an estimate from his engineers. In a letter written to Fall in November he estimated that to build the tanks and fill them with fuel oil would cost $3,600,000, and that 2,973,800 barrels of crude oil, figured at current prices, would be required in exchange.

Doheny also summarized the talk he had had with Admiral Robison in December. Robison said the Navy had decided to build the storage tanks at Pearl Harbor to serve the Pacific fleet with fuel oil, and he tried to induce Doheny to bid. Doheny answered that his associates were not keen about undertaking the construction job. Robison then confided that he had received secret Navy intelligence which indicated warlike intentions on the part of Japan and that construction of a huge fuel oil base at Pearl Harbor had been recommended by the United States Navy Board of Strategy as a necessary measure of national defense. Without it the United States Navy would be at the mercy of the enemy; with it the United States could meet any threat offered by a hostile force. The situation, said Robison, was critical. The country faced the possible destruction of its fleet and an invasion of the Pacific Coast. Robison said he was appealing to Doheny, as he expected to appeal to other responsible oil companies, to bid on the project as a patriotic duty. Doheny was, in his own

words, tremendously "worked up" by Robison's recital, and he vowed that the government would receive at least one bid. Then, he said, he reported the conversation to Mr. J. J. Cotter, the Pan-American Company's general counsel, and told him to take charge.

Doheny corroborated Dr. Bain's account of the meeting in Los Angeles in January of 1922. Bain came to Pan-American Company's offices in Los Angeles, where Mr. Cotter and other representatives of the company were awaiting him. Bain exhibited and explained a set of plans and specifications for the proposed Pearl Harbor construction. He said he proposed to submit copies of them to Union Oil Company, General Petroleum Company, Associated Oil Company, Pacific Oil Company and the Standard Oil Company of California and he hoped to receive bids from all. Bain was told that the submitted papers would be considered.

After Bain left Doheny discussed the government's proposal with his associates. They were reluctant to get into the matter, but yielded when Doheny told them of his commitment to Robison.

During the balance of January, February and March, said Doheny, he was very busy with Mexican problems and spent the greater part of that time in Mexico. Therefore he gave no consideration to the proposed Pearl Harbor installation. Before he left he had commissioned Mr. Cotter and Mr. Danziger, a vice-president of the Pan-American Company, to conduct negotiations with the government officials.

Doheny testified his next information concerning the Pearl Harbor construction came by way of two telegrams from Cotter, dated April 12 and April 13, and addressed to him at Los Angeles. They outlined the proposal the Pan-American Company expected to make. Doheny wired in reply that he approved the proposed bid without modification. Doheny then remarked that it was from the telegrams that he first learned of the so-called preferential clause. Although he did not thoroughly understand it, he approved it because he had complete confidence in Mr. Cotter's work and judgment.

Later Cotter informed him that the bids had been opened and the contract awarded to the Pan-American Company.

Doheny analyzed the terms of the contract and leases in detail and said they were eminently fair to the government. Under them, he said, the government received not only the stipulated royalties, but additional advantages and benefits worth at least $10,000,000.

Doheny now said, as he had before the Senate committee, that he estimated the profit to Pan-American to be derived from the contract and leases at $100,000,000. But, he emphasized, that figure was based upon the assumption that the oil would hold out and that the suggested profit would be realized not at once but "over a lifetime for whoever could live that long."

In concluding his direct testimony Doheny asserted he had in no way bribed Fall. He did not talk to Fall from February of 1922 until he visited him in his Wardman Park Hotel apartment shortly before December 11. At that time there was no discussion about the oil leases. Not once, he insisted, had he spoken to Fall during his term of office as Secretary of the Interior about his future employment. He had never promised Fall anything and he had never asked him to give the Pearl Harbor contract to the Pan-American Petroleum & Transport Company. When he made the $100,000 loan to Fall, five months before the contract was given to the Pan-American Company, reiterated Doheny, the thought of influencing Fall's future conduct never once entered his mind.

Mr. Roberts, who had slashingly cross-examined Bain, Robison and Denby, questioned Mr. Doheny in mild tones. The Government prosecutor may wisely have concluded that the jury might resent a vicious and harassing cross-examination of an aged and physically weakened man. Nonetheless Mr. Roberts went into every detail of the direct testimony. He stressed the "unusual" and "extraordinary" features of the alleged $100,000 loan transaction: Doheny obtained the money from his son's rather than from one of his own bank accounts; he used currency instead of a draft or cashier's

check; and he sent his son as a messenger to deliver it. Doheny countered that, inasmuch as Fall had requested cash, there was nothing unusual in the transaction. There had been, he asserted, no intent or attempt to "cover up" the transaction.

Mr. Roberts also found something sinister about Doheny's tearing Fall's signature from the note. Doheny repeated the explanation of this act that he had given in his direct examination.

Then Mr. Roberts inquired whether Doheny knew, when he accepted thirty-three shares in the Three Rivers Cattle & Land Company, that its property was mortgaged to the hilt and that the interest in the company which Fall had belatedly turned over as security for the $100,000 note was practically worthless. In surprise Doheny replied that the mortgage was news to him.

Once again, at Mr. Roberts' direction, Mr. Doheny restated his direct testimony about his part in the negotiations for the Pan-American Company contract. At the end of Doheny's recital Mr. Roberts sought to impeach the witness by claiming Doheny was now contradicting the testimony he had given before the Senate committee. There were a number of discrepancies, some major and some minor. Doheny frankly admitted he had given the answers imputed to him before the Senate committee, but insisted that his present recollection, refreshed by his examination of correspondence and records and by talks with his associates, was better now than it had been when he appeared before the committee.

Doheny readily admitted that he had claimed a privilege against self-incrimination and had refused to testify in the civil suit in Los Angeles to set aside the Elk Hills and Buena Vista leases. He had done so because the criminal cases against him were then pending and his lawyer had advised him not to testify.

Shrewd though the cross-examination was, it did not discredit Doheny's direct testimony. Doheny made an excellent witness for himself.

At the conclusion of Doheny's testimony, as at other stages

of the trial, Mr. Hogan presented a score of witnesses—bishops, ministers, federal district attorneys, doctors, lawyers, mechanics and old oil prospectors—to vouch for Doheny's reputation as a man of honesty, business integrity and patriotism. Fall's counsel also introduced a number of impressive "character witnesses." Fall himself did not take the stand.

On December 13, 1926, both sides rested, and Mr. Roberts began the summations on behalf of the Government. He prefaced his argument on the facts with the interrogation: "Who are the defendants? What manner of men are they?" He answered his query by characterizing Doheny as "a great and powerful and wealthy citizen of the United States" to whom "a loan of $100,000 meant no more . . . than a loan of $25 or $50 to a common man." Doheny, he persisted, is a man "who boasts he employed Lane, a cabinet minister, at $50,000 a year and an ex-Secretary of the Treasury, McAdoo, at $50,000 a year." He paid Creel $5,000 to influence the official acts of former Secretary of the Navy Daniels. This is the man who says "we can employ anybody we please," and "a man who says he sees nothing wrong with loaning money to a man with whom he was going to negotiate Government contracts." This man was "conscious of and obsessed with the power of money." Fall Roberts characterized in much briefer terms as 'an impecunious cabinet officer" anxious to get additional property and not too scrupulous about how he got it.

Roberts commented that the Presidential executive order of May 31, 1921, a highly important order, was apparently made with little regard for the public good. The reserves were transferred to the Department of the Interior less than three months after Harding had taken office. The transferral was induced by Fall's solicitation. "Had that order not been made," declared Roberts, "we would never have been here in this case."

Step by step the Government prosecutor traced the initiative Fall and Doheny took in the negotiations that led to the culmination of their common purpose—the transfer of the

California reserves to the Pan-American Petroleum & Transport Company. Woven into the pattern was the series of coincidental events which transferred $100,000 from the pockets of Doheny to the pockets of Fall.

Everything about the $100,000 cash loan, declared Roberts, was remarkable—rarely is such a sum of money drawn in cash from a son's bank account, delivered in person and recorded only in a demand note with no signature when there is no concealed and unsavory purpose. A cashier's check would have served Fall's purpose just as well as cash, said Roberts, but Fall did not want a check. Why? Because Blair & Company would then have a record of it. And, why was this enormous amount of cash delivered by Doheny's son? Because, the prosecutor went on, no other human being was to know of the transaction but his own blood, and if Doheny sent his son to the Wardman Park Hotel, where Fall lived and where the Dohenys had also lived and were well known, no one would notice the visit. Thus Fall and Doheny made sure of obliterating all evidence of the transaction.

Then Roberts demanded of the jury:

> Now, Gentlemen, why was all that secrecy observed? Do I need to argue to you? Do I need to labor that kind of question with you intelligent men? It was concealed because if it had become public these men knew they would be ruined.
>
> Why did [Doheny] take a demand note? If Fall could not pay for a long while, if it were a reasonable and proper transaction, why not a year note or a two-year note? But no, Gentlemen, with a demand note he held the whip over Fall.

And next Roberts asked:

> And what can be said about the part that the defendant Fall played? Albert B. Fall knew that the $100,000 business was dirty business. He knew it would not stand the light of day. He knew it would bring down the condemnation of every right-thinking American citizen who heard of it or knew of it. When the Senate committee heard of Secretary Fall's sudden wealth, of his going down and buying this ranch for

$100,000, what happened? Fall knew that some explanation was required. . . . What did he do? He sent for Edward B. McLean, a man who was his friend.

Then the prosecutor recounted McLean's story. He took up Senator Lenroot's testimony and told how Fall lied to him and Senator Smoot. "Why lie to his friends," asked Roberts, "to men who were going to help him, to men who would have helped him if he had been willing to bare the truth?"

The prosecutor ridiculed the alleged conversation between Admiral Robison and Doheny concerning the threat of a Japanese invasion, the peril of America and Doheny's bidding solely as a "patriotic duty."

What kind of a patriot is a man who carries away with the American flag around it 59,000 acres of oil land in a lease? The preferential right did not have to go into the April 25 contract to save us. I don't know how it would save the nation to take away $100,000,000 profits from these lands. I fail to see any patriotism in a thing like that.

Denby was characterized as a man "who never did know the story and doesn't know it now," but who now attempts "to take responsibility for something he knows nothing about."

The prosecutor made much of the fact that Cotter, who was "in every phase of the case from start to finish . . . who knows more about it than any human being, even more than Mr. Doheny himself," was not called as a defense witness. The justifiable implication, said Mr. Roberts, was plain: He was not called because the defense knew his testimony would not support Mr. Doheny's contentions.

The prosecutor's final words were challenging:

What reasonable doubt have you of any material and essential feature of this case? What reasonable doubt can you raise? Do you doubt that there was a transaction in which $100,000 was involved? Do you doubt Mr. Doheny's word that he realized and knew that that $100,000 would tend to make Mr. Fall favorable with regard to Government

contracts? How can you conjure a doubt about that? . . . Do you doubt that he expected to get royalty oil and leases under that proposition? . . . Do you doubt his statement that he expected to make $100,000,000 out of that contract? Do you doubt his own statement that that contract was made without competition? Do you doubt his own statement before the committee that that contract was the outgrowth of the preferential right in the contract of April 25, 1922? I am not asking you to take this case from anything but the written documents and records that these men made at the time, signed over their own hands and their own admissions in writing, and Mr. Doheny's admissions from that witness stand.

After a short intermission Mr. Hogan began the summations for the defendants. He referred first to the legendary story of Diogenes and his search for an honest man; he marveled that with all the talent in the regular government service it had been necessary to go to Philadelphia for a lawyer who could be trusted to prosecute two old men who had faithfully served their country.

These men with honored names, said Hogan, had been subjected to "as vicious a vilification as ever polluted the atmosphere of a court of justice." Denby, Bain, Ambrose and Robison—all men of worth—had not escaped his wholesale condemnation.

The defense advocate spoke dramatically:

Men, no case has ever been won which had to be sustained on the wrecking and the breaking of the reputations and the good names of more than half a score of your fellow citizens. And I would lose my faith in human nature and have no abiding confidence in the institutions of our country if I thought it could succeed now.

Mr. Hogan then took up the payment of the $100,000 and capitalized on Mrs. Doheny's unchallenged testimony concerning the transaction. He ridiculed any suggestion that the money was a bribe.

A bribe is something from which the briber expects to get that which he is not entitled to. Have you ever heard or

thought or dreamed of an honorable man constantly thinking of the possibility of the approaching end that may come at any moment because of advancing years, saying "if I die when I am gone, and no possible advantage can come to me, I ask you, partner of my life, you who have shared my sorrows and my joys, you to whom I will leave my worldly goods, I ask you to carry out the friendly loan to my old friend to keep the pledge and promise which voluntarily I have offered."

Mr. Hogan rejected as preposterous the prosecution's argument that the note had been made a demand note so it could be held as a whip over Fall. If, as the Government claimed, it was a bribe, it was void and uncollectible. If the whip was used and bribery was discovered, not only Fall but Doheny would be ruined.

Roberts, said Mr. Hogan, had affected to find something sinister in the tearing of the note, but he had not pointed out anything about the act that was sinister. He had not cross-examined Mrs. Doheny. Her testimony, corroborated by her husband, had offered a logical and reasonable explanation of the act. Hogan challenged the jury to find that Mrs. Doheny, "the loyal, clearheaded, outspoken little woman," had perjured herself. Yet, said he, the jury must do just that if they rejected her explanation of her husband's defacing the note.

Mr. Hogan reminded the jury of a letter sent to the Senate early in its investigation. In that letter President Harding gave "very full and complete approval" to all that Denby and Fall had done in connection with the oil reserves. And this, said the lawyer, was after the contract of April 25, 1922, with the Pan-American Petroleum & Transport Company had been made. The ex-President of the United States, declared Hogan, was "a silent witness" for the defense.

The defense attorney then strove by reference to the documents and testimony to convince the jury that the whole idea of fuel oil storage at Pearl Harbor and exchange of crude oil for fuel oil had originated with the Navy. The Interior Department had participated in it only at the Navy's suggestion, and competent and responsible and patriotic Navy officials

had been responsible for the conduct of the negotiations which culminated in the contract of April 25, 1922.

Cotter, said Hogan, had not been called as a witness because he was one of the counsel in the present case. Had he been called the Government would have shouted that he was Doheny's lawyer and cried, "How much can you rely on a paid lawyer?" The case, said Hogan, had been completely proved without him.

Denby, "the fighting marine," and Robison, "the captain of a battleship in time of war," were defended as patriots who had risked their lives in the service of their country.

Hogan closed with a plea for the acquittal of both Doheny and Fall:

> Everything I have said in this case I have said for Albert B. Fall as well as for Edward L. Doheny. I am not Mr. Fall's counsel of record, but I would be proud to be. . . . I want you to know that every piece of evidence we adduced on the stand was adduced for Fall as well as Doheny.

Hogan's closing utterance was a well-timed preliminary to the arguments of Fall's attorneys, Mr. Thompson and Mr. Lambert. Mr. Thompson took up Hogan's concluding theme by stressing the magnificent record and reputation which Fall had made in a lifetime of public service. He said that to believe that at the close of his life Fall would risk losing public esteem by accepting a bribe to influence his official conduct was absurd. He emphasized the "openness" with which Fall had gone about the purchase of the Harris ranch—proof positive, said Thompson, that there had never been a thought in Fall's mind that the money was "dirty." True, said Thompson, he had lied to the Senate committee about the source of the money but he had lied because the "so-called committee had no legal or moral right to exact from these men anything as to their personal transactions."

Mr. Thompson closed his argument with a laudation of Fall's public and private career—a career, he declared, that "any American might be proud of."

Mr. Lambert's argument was a castigation of Government Prosecutor Roberts for "a magic touch" which took up pieces of evidence and "made them livid with suggestions of criminality and unrighteousness of every kind."

Lambert reviewed the evidence carefully to show that Fall never asked Doheny for a loan. Fall had merely told a friend he needed to buy the adjoining Harris ranch to protect his water supply, and he had pending negotiations with McKinney and McLean to raise the money by selling them a partnership interest. The friend, Doheny, voluntarily offered to lend Fall the money.

Mr. Pomerene closed the summations. He defended Mr. Roberts against the bitter attacks which defense attorney Lambert had made upon him. He defended the Senate committee as a public body which had done its duty and in the face of great odds and had protected and saved the oil reserves of the United States.

For the suggestion that President Harding was "a silent witness" for the defense Mr. Pomerene had only scorn. There was no evidence, he declared, that when Harding sent his letter to the Senate he knew that Fall had been bribed or that Doheny had procured a contract out of which he was going to make $100,000,000. "I deeply regret," said Mr. Pomerene, "that they have desecrated [Harding's] tomb by bringing forth his shroud to cover up the infamy of this transaction."

Pomerene reiterated the arguments Roberts had made about the peculiar circumstances of the $100,000 note and reminded the jury that Fall and Doheny had lied and equivocated when they were before the Senate committee.

He also paid his respects to defense witness Bain and quoted sarcastically the confidential letter that had passed between him and Fall—"None of us want Mr. Doheny to get into any trouble." Then the prosecutor asked:

You heard the letter read. Do you remember a single word in it which Bain uttered to the effect "I am afraid the United States of America will get into trouble." Oh, no! No solici-

tude for the Government—your Government and mine that was paying him his salary.

Pomerene scoffed at Robison's pretended concern about the "war peril." So far as appeared from the evidence, said the prosecutor, Robison told no one else of this terrible danger. He reported none of it to Congress. The only man in all the world he reported it to was Edward L. Doheny. "Who believes that stuff?" shouted Pomerene. Then followed a reference to the undisputed and indisputable fact that on March 24, 1922—a month before the execution of the Pearl Harbor contract—the United States Senate ratified a treaty among this country, Japan, France and Great Britain for a drastic limitation of naval armaments.

Pomerene closed with an apt quotation from one of Edwin Markham's famous verses:

> I fear not titan traitors that shall rise
> To stride the broken shadows of our skies....
> I fear the vermin that shall undermine
> Senate and school and citadel and shrine;
> The worm of greed, the fatted worm of ease
> And all the crawling progeny of these.
> I fear the vermin that shall honeycomb towers
> And walls of state in unsuspecting hours.[22]

At two o'clock Wednesday afternoon, December 15, 1926, Judge Hoehling began his charge to the jury. It was a surprisingly brief statement of the principles of law on the presumption of innocence, of the necessity for the Government to prove the guilt of the defendants beyond a reasonable doubt, of the law and the rules of evidence applicable to a charge of criminal conspiracy and of admonitions to decide the case without passion or prejudice or a consideration of the wealth or social positions of the defendants. With commendable prudence the Court attempted no analysis of or appraisal

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[22] Exactly as quoted by Mr. Pomerene and printed in contemporary newspaper accounts of the trial.

of the evidence. It contented itself with the error-proof comment that the jury had seen the witnesses and heard the testimony and that it was for the jury to consider all the evidence, testimonial and documentary, and to decide, under the Court's instructions, what were and what were not the facts.

The twelve jurors retired in the custody of the marshal. They took with them the hundreds of exhibits which had piled up on the counsel tables during the long trial. For nineteen hours the jurors deliberated. Rumor said they were hopelessly deadlocked. Then, unexpectedly, came the announcement they had agreed. Twelve tired and worn men filed into the courtroom. Their verdict was read.

The jury found both defendants not guilty.

When the much-publicized case against Fall and Doheny for conspiracy to defraud brought no conviction, the public discouragedly predicted that the other three indictments probably would be dismissed. But, despite the fairly general assumption that none of the instigators of the Teapot Dome Scandal was to be punished, the Government persisted in its charges against Fall and Sinclair. The case against these men for conspiracy to defraud the United States was brought on for trial in the Supreme Court of the District of Columbia on October 17, 1927. The Honorable Frederick J. Siddons presided. As in the first case, Messrs. Roberts and Pomerene and members of the staff of the local United States district attorney represented the Government. Messrs. Thompson and Lambert, who had successfully argued for Fall before, appeared for him in the second trial. Sinclair, the other defendant, was represented by the distinguished and resourceful Martin W. Littleton. Mr. Littleton was assisted by members of the legal staffs of various Sinclair companies.

For two weeks the trial proceeded with no new or startling developments. A jury of ten men and two women was promptly secured, and opening statements were made. Then the Government presented its evidence. The prosecution was nearing the end of its case when the trial was halted by the sensational announcement by United States Prosecutor Pom-

erene that the Government would move for a mistrial on the ground of the discovery of a plot to tamper with the jury. In support of his motion Mr. Pomerene presented the affidavits of four government secret-service men that from the day the jurors had been sworn to try the case they had been continuously "shadowed" by operatives of a detective agency engaged by Sinclair. The agency named was the well-known W. J. Burns International Detective Agency. Mr. Pomerene contended that such surveillance amounted to an obstruction of justice and a contempt of court.

After a brief hearing Judge Siddons allowed the motion and discharged the jury.

On November 23 following, the Court, on motion of the Government's attorneys, entered a rule upon Harry F. Sinclair, Henry Mason Day, an employee of one of the Sinclair companies, William J. Burns and W. Sherman Burns, co-owners of the detective agency, to show cause why they should not be adjudged guilty and punished for a criminal contempt of court. The respondents filed separate sworn answers, and on December 5 the matter came on for trial. All of the accused, except Sinclair, testified. In this contempt case more than a hundred witnesses were called, and the hearing lasted well into the following February.

There was no dispute on the more essential facts. Sinclair had commissioned Day, one of his business associates, to engage detectives to watch the jurors. In his sworn answer Sinclair stated he had done so because he had reason to believe the veniremen had been under surveillance by representatives of the Department of Justice, and he feared that efforts would be made unlawfully to influence them. Day, acting under Sinclair's direction, had engaged the Burns International Detective Agency to carry out Sinclair's directions.

The jury which was to try the conspiracy case had been sworn in on October 18. The day after fifteen detectives from the Burns Agency, including a manager and supervisors, were assembled in Washington. Sinclair had obtained from his counsel biographical sketches of the jurors, and

these were turned over to the agency manager. Eleven jurors were singled out for shadowing. Each was assigned to an operative who was furnished with his "subject's" biography.

Thereafter until October 24 the eleven jurors were followed from early morning until late at night—3:00 A.M. in one instance—and daily reports were made to Day by each of the operatives. On October 24 the surveillance of all but three jurors was abandoned. An investigation had been made concerning the incumbrances on the home of one of the three jurors kept under observation. Inquiries had been made among the neighbors and friends of another to discover if he had expressed any opinions on the case since it had been on trial.

There was no evidence that any operative was instructed to approach, or did approach, a juror or that any juror actually knew he was being followed. Some testified they were suspicious. Neither the Court nor defendants' counsel knew that the shadowing was going on until Mr. Pomerene formally announced it to the Court.

It was strenuously contended on behalf of Sinclair and his associates that what they had done was neither illegal nor improper. They had not tried to influence nor intimidate the jurors. All they had done, or had tried to do, was to see that the jurors were not improperly approached by others. The defense counsel proffered many witnesses, brought from all parts of the country, who, it was said, would testify that for many years United States attorneys had made it a practice to have agents of the Department of Justice "shadow" jurors in important criminal cases. The Court declined to hear this testimony on the ground that it was wholly irrelevant to the situation being considered.

On behalf of the respondent William J. Burns it was contended that he was not actively directing the agency which bore his name and had had no part in the shadowing of the jurors. He had, in fact, known nothing of it until October 31, when he read the Government's disclosure of it in a newspaper.

The trial judge held that all of the defendants had been proved guilty of a contempt of court. All, he said, had been involved, to a greater or less degree, in a surveillance of the jury which in his opinion constituted an obstruction to the due administration of justice. Surely, he said, when such surveillance had caused the Court to declare a mistrial in a case which the jurors had been sworn to try, it could rightly be called an obstruction of justice.

Sinclair was sentenced to six months' imprisonment, Day to four months and William J. Burns to fifteen days. W. Sherman Burns was fined $1,000. All of the respondents appealed.

With the contempt proceeding out of the way, the Government prosecutors pressed for a retrial of the conspiracy charge against Sinclair and Fall. By this time, however, Fall was seriously ill, and his attorneys pleaded for a continuance of the case to a time when he might be physically able to undergo the ordeal. Several such continuances were granted on the basis of interim examinations of Fall by his own physicians and physicians appointed by the Court. On March 23, 1928, the Government prosecutors determined to wait no longer and declared they would proceed with the trial of Sinclair alone.[23] The Court entered an order of severance, and set the case for April 4. Meanwhile Fall, as a witness for the defendant Sinclair, gave his deposition from his bed in his New Mexico home. Finally, after more delay, the trial got under way on April 10.

Judge Siddons again presided. Messrs. Roberts and Pomerene represented the Government and Martin W. Littleton and his associates appeared for Sinclair.

The Government's evidence paralleled substantially the evidence that had been presented three years before in the civil trial to set aside the Teapot Dome contract and leases. There was one important addition—when Fall's son-in-law, M. T. Everhart, had been called as a witness in the civil case and in the earlier mistrial of the conspiracy case against Fall

[23] Fall was never tried for his conspiracy with Sinclair to defraud the United States.

and Sinclair he had refused to testify on the ground that his answers might tend to incriminate him. On the trial now being considered that refuge had been taken away from him. On December 29, 1927, President Coolidge had signed a bill, piloted through Congress by the relentless Walsh, which changed the statute of limitations for any offenses Everhart might have been charged with from six to three years.

Everhart was compelled to testify. Reluctantly he answered that in May 1922 he had gone to Washington at Fall's request. Fall told him he had arranged with certain parties to sell a third interest in the Three Rivers Land & Cattle Company and wanted Everhart to assist him in closing the deal. In Washington Everhart met Sinclair. Sinclair gave him a package which contained $233,000 in Liberty bonds.

The capital stock of the Three Rivers Land & Cattle Company consisted of 100 shares. Fall had caused four certificates of stock to be made out—one to a dummy director for one share, one to Fall for thirty-three shares, one to Everhart for thirty-three shares and one to "M. T. Everhart, Trustee" for thirty-three shares. When Everhart received the certificate for thirty-three shares made payable to him as trustee, he was told by Fall he was trustee for Sinclair. Everhart had this certificate with him when he received the bonds from Sinclair and offered it to him. Sinclair said to keep it with the company's papers. The land and property of the Three Rivers Land & Cattle Company, said Everhart, was estimated to be worth $700,000 and the thirty-three per cent interest purchased by Sinclair amounted to almost exactly $233,000, the amount of the bonds which Sinclair had turned over to him.

Everhart testified that when he showed the package of bonds to Fall, Fall opened it and took out $2,500 worth of bonds. The remainder, $230,500, he returned to Everhart, who expressed them to the First National Bank of Pueblo, Colorado. Everhart was a director of that bank. Of the $230,500 in bonds, $140,500 worth of them were used to repay loans which Fall, Everhart and the cattle company had made from

the Thatcher Estates Company. The balance was placed in a safety deposit box for Fall.

Everhart recounted that late in the fall of 1922 Sinclair visited Fall in Three Rivers, New Mexico, and paid him $10,000. This sum and $25,000 more paid later were for "ranch expenses." These amounts, Everhart said, were deposited to the credit of the Three Rivers Land & Cattle Company and were used to discharge its obligations.

With its earlier testimony and with the new evidence from Everhart, the Government made a strong case against Sinclair—stronger, indeed, than the one it had made against Doheny.

Sinclair's defense—supported by his representatives who had handled the negotiation with the government, by Admiral Robison and various other officials of the Navy and Interior Departments—was essentially that the Navy had been gravely concerned by the threat of the loss of the oil in the Teapot Dome reserve through drainage, and had urged Sinclair to bid. Sinclair said that at first he had declined but later yielded to the pressure placed on him by government officials and the appeal to his patriotism. He had, throughout all the transactions, dealt with the government at arm's length. The lease he had obtained, while it might in the course of time return a profit to Mammoth Oil Company, was highly beneficial to the government.

Fall by his deposition confirmed that there was great anxiety among government officials over the threat of the ultimate loss of all the oil in the reserves through drainage and that the Navy wished to salvage as much of the oil as possible. He also averred that Sinclair had reluctantly bid for the lease. Fall declared that his personal connections with the Mammoth Oil Company lease had been few and unimportant because the details were all handled by subordinate Navy and Interior officials, none of whom had been influenced by him in any way. His financial dealings with Sinclair, he insisted, had been wholly unrelated to the oil lease, and none of the

money that had come from Sinclair to him or Everhart or the Cattle Company in which he was interested had influenced or been designed to influence his official conduct.

Sinclair himself did not take the stand.

The summations of all three attorneys—Roberts and Pomerene for the Government and Littleton for the defense—were brilliant. Then the judge, after delivering his instructions, left the case to the jury. On April 21, 1928, after a long deliberation, the triers returned a verdict of not guilty.

Now Sinclair was, except for the pending contempt sentences, clear of trouble. His respite lasted a year. On April 8, 1929, the Supreme Court of the United States affirmed the sentence against him for contempt of the Senate committee,[24] and on June 4 of the same year affirmed the sentence which had been pronounced against him for criminal contempt of court in obstructing justice in his first conspiracy trial.[25]

It was on May 6, 1929, that Sinclair surrendered to the authorities. He was confined in the district jail in Washington to serve his sentence of three months for contempt of the Senate committee. That sentence terminated July 19, but Sinclair remained in custody to serve the six months' sentence for contempt of court. Shortly before Christmas he was released.

In the autumn of 1929 Fall was tried despite his illness. On October 7, in the Supreme Court of the District of Columbia, the Government opened its case against him on the indictment accusing him of accepting a bribe from Doheny.

The issue in this case was substantially different from the issues involved in the previous prosecutions against Doheny, Fall and Sinclair. In those cases the defendants were charged with a conspiracy to defraud the United States of its naval oil reserves through corruptly obtained contracts and leases. To oppose that charge the defendants had been able to present plausible evidence that drainage did threaten the naval oil

[24] 279 U. S. 263.
[25] 279 U. S. 749.

reserves and that a development of the reserves either by the government or a private operator under lease was desirable. Furthermore, the defense in those cases had presented substantial evidence that the leases made to the Doheny and Sinclair companies, instead of being harmful to the United States, were fair and reasonable and extremely beneficial to it. In the earlier trials the jury had had to decide whether there had been a conspiracy to defraud the United States. The defense lawyers had stressed that if the jury did not believe the government had been defrauded, it ought not convict the defendants. This argument had done much to win the acquittals in the conspiracy cases.

In the case which now confronted Fall he alone was the defendant. And his guilt was in no way contingent on injury done to the government. Fall was accused of accepting a bribe while he was an officer of the United States and acting in his official capacity. By the section of the Federal Criminal Code under which he was tried, the crime was complete if the accused should "ask, accept or receive any money . . . with intent to have his decision or action upon any question . . . which may at any time be pending before him in his official capacity . . . influenced thereby." Whether the action induced by the bribery was desirable or undesirable, beneficial or harmful, was entirely immaterial.

It will readily be seen that the issue now to be tried was both more tangible and more restricted than the other. Its very narrowness created a danger to Fall greater than any he had yet faced.

Fall's health was so fragile that he was constantly attended by a nurse. Hunched over in a big Morris chair, he supported himself with pillows; the lower part of his body was covered with a heavy blanket. His snow-white hair accentuated the deathlike pallor of his lined and emaciated face. When the Honorable William Hitz ascended the bench and the court crier gaveled the crowd to attention Fall tried to arise, but fell back in his chair.

Despite his client's frailty Mr. Frank J. Hogan, who now represented Fall in association with Messrs. Lambert and Thompson, announced that the defense was ready. In less than two hours eight men and four women had been selected and sworn in as the jury to try the case. Late in the morning the proceedings were interrupted when Fall suffered a slight hemorrhage of the lungs and had to be removed to his hotel. Mr. Hogan and the Government's attorneys spent the remainder of the day identifying and numbering the numerous exhibits which would be offered during the trial.

At the convening of court the following day the opening statements were made. Mr. Roberts' took less than fifteen minutes, but that of Mr. Hogan on behalf of Fall lasted more than three hours. Mr. Hogan, following the pattern he had set in the earlier trial of Fall and Doheny for conspiracy, went into his proposed evidence in the most minute detail. The recital wove fact and argument together so skillfully that the Court felt prompted to caution the jury that the statement was not evidence but "consist[ed] only of what a very optimistic counsel hopes to prove."

On the ninth the defendant's condition suddenly got worse. His physician reported that he was very weak and was running a temperature of 101°. Fall had to be practically carried in and out of the courtroom. Judge Hitz adjourned the hearing and appointed a physician of his own choice to examine the defendant. The court's doctor confirmed the report of Fall's physician: Fall was a very sick man, too sick to be put under the strain of the trial. It looked as though the case would be continued when Fall himself, summoning all his strength, demanded that the trial proceed.

On the eleventh the hearing of testimony began. In large part the evidence followed almost literally that which had been offered by the prosecution and the defense in the earlier trial against Fall and Doheny for conspiracy to defraud the government.

Because McLean was not available as a witness the testi-

mony he gave in the former trial was offered and read to the jury; Edward L. Doheny, Jr., had been killed in an accident the previous February and his earlier testimony was also read. Ex-Secretary Denby did not appear so his testimony too was drawn from the records of the other trial. Bain, Robison, Ambrose, Edward L. Doheny and Mrs. Doheny all appeared in person and testified for the defense.

The case reached its high point of debate toward the close of the Government's case. Prosecutor Roberts offered evidence of the financial transactions between Sinclair and Fall. Mr. Hogan objected that the only charge in the indictment was Fall's acceptance of a bribe from Doheny and that evidence of his dealings with Sinclair were wholly irrelevant. Mr. Roberts countered that the defense had made an issue of the purpose for which Doheny had paid and Fall had accepted the $100,000 and evidence of the Sinclair transactions would disprove the claim of an innocent intent by showing that Fall had received another huge sum of money in a substantially similar transaction with Sinclair. The parallel was particularly significant, argued Mr. Roberts, in view of Fall's unequivocal denial before the Senate committee that he had ever received, directly or indirectly, a single dollar from Doheny or Sinclair or any of their companies.

After the point had been fully argued Judge Hitz ruled the testimony admissible. It was a body blow to the defense.

Fall's son-in-law, M. T. Everhart, was called and repeated the story of the Liberty Bonds and shares of ranch stock which he had told in the trial of Sinclair for conspiracy. Mr. Hogan in cross-examination did his best to give the circumstances the cast of a legitimate business transaction, but no amount of cross-examination, or willingness on the part of the witness to aid the examiner, could get around the fact that $268,000 of Sinclair's money had found its way to Fall.

Fall did not take the stand in his own behalf.

The arguments of counsel followed much the same pattern they had taken in the previous Doheny-Fall conspiracy trial.

Mr. Pomerene opened for the Government; a contemporary newspaper reported that "with a grim countenance he made a complete, dispassionate and devastating summary of the evidence."

Mr. Hogan followed Mr. Pomerene. As in the former trial he argued the innocent nature of the $100,000 loan and its complete independence of any negotiation that had taken place between Fall and Doheny or between Doheny's representatives and the Interior and Navy Departments. He did not touch on the Sinclair evidence. The core of his argument was plea for fair treatment—he did not call it sympathy—for a "faithful public servant," now a "tragic figure . . . shattered and broken . . . an old man tottering on the brink of the grave." His eloquence brought tears to the eyes of many in the crowded courtroom. One of the women jurors wept openly.

Messrs. Thompson and Lambert followed with similar emotional pleas for Fall.

Mr. Roberts concluded the summations. Solemnly he told the jurors that the sympathy they must feel for the defendant should not be permitted to influence their verdict—the Court also would tell them that. The issues, he said, were simple:

> There are four things of a controlling nature. One is that Doheny wanted the lease of Elk Hills. The second is that Fall wanted money. The third is that Doheny got the lease. And the fourth is that Fall got the money.

Mr. Roberts argued vigorously the testimony of Fall's relations with Sinclair to show "the criminal intent of Fall to make money out of his position of trust and honor."

The Court's instructions were brief and, while legally unassailable, were unfortunate for Fall. The judge cautioned the jurors strictly against allowing sympathy to affect their verdict. He also referred specifically and emphatically to the testimony relating to the Fall-Sinclair relationship as evidence of a transaction similar to the Fall-Doheny relationship. The jury might, he announced, properly consider that paral-

lel in deciding the question of the intent with which the $100,000 payment had been made to Fall by Doheny.

The jury deliberated eleven and a half hours, and on the morning of October 25, 1929, returned its verdict: guilty, with a recommendation for mercy.

Fall's counsel, family and friends were stunned by the verdict. The results of the previous trials and Fall's apparently dying condition had led them to expect an acquittal. According to one news account Hogan "was pale to the point of ashiness." Fall's wife and two daughters burst into tears. Thompson, one of Fall's counsel, fell to the floor in a dead faint. Fall sat slumped in his invalid's chair, apparently oblivious to what had happened. "There was," to quote the press again, "no one in the room who was not touched by the pathos of the scene."

Mr. Hogan immediately moved for a new trial. His principal ground was that there had been error in the Court's charge and in the admission of the evidence of Fall's transactions with Sinclair.

On November 1 following, the motion was heard and overruled, and Fall was sentenced to a year's imprisonment in jail and to pay a fine of $100,000. The defense gave notice of an appeal.

While Fall's appeal was pending the remaining indictment against Doheny—the one which charged him with the bribing of Fall—was called for trial. Justice Hitz again presided. Messrs. Roberts and Pomerene appeared for the Government. Mr. Hogan represented Doheny. A jury of nine men and three women was selected and sworn to try the case.

The evidence was practically identical with the evidence offered on Fall's trial for bribery, but with one important difference—no testimony was offered on Fall's financial relations or transactions with Sinclair.

The summations, while they reached the heights of bitterness on both sides, were virtual repetitions of the arguments made on the previous trials of Doheny and Fall for conspiracy.

The Court's charge was a well-balanced statement of the law of the case, and in one respect was distinctly favorable to Doheny. The Court charged that because of their different situations a guilty intent might be found as to Fall and not as to Doheny. The value of the Court's differentiation is obvious.

Doheny was found not guilty.

## Aftermath

It was January of 1931 before Fall's appeal came on for oral argument before the United States Court of Appeals. Mr. Hogan's plea was impassioned. No point that could have been made in Fall's behalf was overlooked. Hogan, however, faced insurmountable odds. In its opinion on the appeal of the Pan-American Petroleum & Transport Company from the decree setting aside the Elk Hills leases, the Supreme Court had said:

> The facts and circumstances disclosed by the record show clearly that the interest and influence of Fall as well as his official action were corruptly secured by Doheny . . . and that the consummation of the transaction was brought about by means of collusion and corrupt conspiracy between him and Doheny.

It was conceded that with the exception of the evidence concerning the Fall-Sinclair relationship the evidence in the criminal case under appeal was identical with the evidence in the civil suit which had been reviewed by the Supreme Court.

On April 7, 1931, the Court of Appeals handed down its decision.[26] It found no error in the lower court's instructions and agreed with the trial judge that the evidence of the Fall-Sinclair transactions was relevant on the question of

[26] F. (2d) 506.

Fall's intent. It quoted freely from the Supreme Court's decision in the civil case and unanimously affirmed the judgment of the conviction.

On June 6 the Supreme Court of the United States denied Fall's application to review the decision of the Court of Appeals.

An application to the President for an executive pardon was denied.

Fall was through. His condition of health was serious—a fact reconfirmed after the conviction had been upheld by a committee of physicians appointed by Justice Hitz of the District of Columbia Supreme Court. The condemned man's attorneys and friends besought and obtained the sympathetic consideration of the Department of Justice. It selected a place of confinement where he could have proper medical care and be near his family.

It was found that Fall could legally be confined in the New Mexico State Penitentiary at Santa Fe if one day were added to his sentence. A court order adding the day was entered by agreement and on July 20 the doors of the Santa Fe prison closed on the onetime United States Senator and Secretary of the Interior.

Albert Bacon Fall became convict No. 6991.

Examination by the penitentiary physicians revealed that Fall was suffering from chronic tuberculosis. He was taken to the institution's hospital for treatment and remained there until his term of imprisonment had been served. The fine of $100,000 imposed upon him as part of his penalty was never paid—Fall filed a "pauper's oath."

With the conviction and imprisonment of Fall the decade of litigation which had followed the so-called Teapot Dome disclosures came to an end.

Doheny, a multimillionaire oil tycoon, had been twice tried for criminal acts and acquitted. Sinclair, another multimillionaire oil magnate, had been tried and acquitted of a criminal conspiracy to defraud the government, but he had

run afoul of the processes of justice and been compelled to serve jail sentences of nine months. Fall, a Presidential cabinet officer, had been tried and convicted and was serving time for bribery.

More important, perhaps, than these prosecutions and convictions was the restoration of the fabulously rich oil reserves at Teapot Dome and Elk Hills to the United States Navy.

# III

## The Trial of
## ALPHONSE CAPONE
## for Income-Tax Evasion
## (1931)

# 3

# The Al Capone Case

THE CAPONE CASE *is a chapter in the story of an era in American life—"the incredible twenties." In that decade corruption and lawlessness reached their most flagrant heights and their most sordid depths.*

*Albert B. Fall and his criminal associates descended from the heights. Capone emerged from the depths. Capone was the logical product of his times. Amoral, ruthless, but equipped with not a little ability for leadership and organization, he amassed millions by catering to the passions and appetites of tens of thousands who were no more concerned with law enforcement than he was.*

*The unpopular and, as it proved, unenforceable prohibition law, the venality and complacency of public officials and the laissez-faire attitude of the general public combined to permit Capone to attain an incredible stature as the head of organized lawlessness—as America's "Public Enemy Number One."*

*Although openly charged with dozens of murders and lesser crimes of violence, Capone for eight years enjoyed complete immunity from prosecution under state laws. He was finally brought to trial and convicted by a Federal court—on the charge of income-tax evasion. While his conviction by a Federal court and his temporary removal from society were a satisfaction and relief to the law-respecting element of his community, it served by contrast to make the impotent attitude of the local law enforcing authority throughout his notorious splurge of lawlessness the more discreditable. The Ca-*

*pone case is significant not only because it tells the story of the fantastic "millionaire gorilla" who threatened the stability and security of law-abiding citizens but also because it reveals much about the society which nurtured him and then was so frightened and appalled by its product that it was glad to see him convicted of any crime that could be proved.*

CHICAGO's old Post Office and Federal Building, which occupies an entire square block in the heart of the Windy City, is an ancient and somber pile of stone and iron. Its construction took over six years. A popular, rollicking song of the Gay Nineties predicted that its side walls, weakened by age and disuse, would surely collapse before the heavily ornamented and domed roof was mounted on them. This dire prophecy was not fulfilled. The building—minus some stretches of its roof coping—still stands. It houses, besides a few postal facilities, the Department of Justice and an ever-increasing number of district courts.

The place is scarcely inviting. The huge central rotunda and the three wide passageways leading to public streets are usually littered with fragments of letters from the "general delivery" boxes and the wrappings of candy bars and other confections sold at a news and general-supply stand on one side of the spacious inner circle. Two banks of dingy, wobbling, creaking elevators, operated at the whim of the individuals in charge, carry persons to and from the upper floors.

Of the numerous rooms on the upper floors, those provided for the district courts are alone impressive. They are spacious, airy, solidly furnished and regularly cleaned. In the older courtrooms superb murals depict the Blind Goddess of Justice holding her scales, Moses handing down the Twelve Tables of the Law, King John signing the Magna Charta at Runnymede, and the delegates to the Constitutional Convention signing a report of its proceedings, and other scenes illustrating the development of supremacy of the law.

These courtrooms ordinarily have no lure for sensation

hunters. "Court fans" seek the state courts where they may chance upon a murder or rape trial or a sensational divorce case. The cases tried in the Federal courts are, for the most part, dry and uninteresting to the layman: on the civil side, bankruptcies, receiverships and damage suits against nonresident corporations; on the criminal side, prosecutions for dope peddling, mail frauds and violations of the antitrust, liquor or internal-revenue laws.

What, then, was it that on October 6, 1931, drew mobs of excited, shoving men and women to the Federal Building? They blocked the streets and sidewalks, halted traffic in front of the entrances, jammed the rotunda and aisles on the first floor, overloaded the elevators and occupied every foot of available space on the sixth floor. Only areas assigned to courtrooms or taken up with telegraph equipment, photographic tripods and cameras, typewriters and typewriter stands were free of the mob. United States marshals and local police had to struggle to clear even narrow passageways to the courtrooms.

The citizens of Chicago had flocked en masse to the Federal Building because Al Capone—"Scarface Al," "the World's Foremost Gangster," "Public Enemy Number One"—was going to trial.

Trial for what? An alert newspaper reporter caught the answer from the crossfire badinage of the crowd. "He's being tried for not paying his income tax."

"Nuts!" said another spectator. "He's a killer, the most dangerous man in America, but he's got the state courts fixed. This income-tax stuff is the only thing they can pin on him."

"They'll never get him," cried a third voice.

"Oh, yes, they will" came a reply. "There's no fix with these Federal guys. They're tough."

Who was this Al Capone, this "Public Enemy Number One?"

To begin with—and this can be stated without fear of contradiction—no other private individual in history was accused and probably guilty of so much and convicted of so little as

was Al Capone. Capone's official criminal record was brief. Before October 1931, when he was tried for tax evasion, it consisted only of two arrests on suspicion of murder (followed by almost immediate releases without court hearing), an indictment for violation of the Federal Prohibition Law (shortly dismissed without trial) and a conviction and a year's jail sentence on a charge of carrying concealed weapons. In February 1931, Capone received a six-months' sentence for contempt of the Federal district court in Chicago in making a false affidavit of illness to postpone an appearance in response to a Federal grand-jury subpoena.

Capone's reputed record, as published and republished in the nation's newspapers and magazines, was quite different. For eight years before his trial for violation of internal-revenue laws, the Chicago press had been issuing almost weekly charges against him. Referring to him always as "Scarface," "the Nation's Foremost Gangster," or "Public Enemy Number One," the headlines accused Capone of committing or engineering murders, of openly and continually violating state and Federal statutes and of purchasing immunity from prosecution by bribing venally inclined county and state officials.

It is from newspaper and magazine files that one must piece together the story of Al Capone. He never bothered to deny the charges published against him, and it is probable that these unofficial sources provide a fairly accurate account of his activities.

Alphonse Capone was born in Naples in 1899. His parents were hard-working, decent people who immigrated to America shortly after the turn of the century. The family—mother and father, five sons and one daughter—settled in the Williamsburg section of Brooklyn. As a child Capone was given little or no education or parental supervision, and he seems to have been a member of one or another of Brooklyn's numerous neighborhood "kid gangs" from the time he was old enough to start to school. As he grew older he progressed from petty thievery and window smashing to the more impor-

tant activities of gangdom. By the time he was nineteen he was a member of a regular organization, the Five Points Gang, and was a reputed labor-union "slugger." He had already been suspected of armed robbery and murder. In his later days of fame his Brooklyn associates remembered him as a good-looking, affable, soft-spoken lad, undistinguished in everything except his flashy clothing and his skill as a dancer. Capone's boyish good looks were marred in a tangle with a hot-tempered knife-wielding young Sicilian. After the fight Al was marked with a permanent identification—a slash in his left cheek which described an arc from the top of his ear to the corner of his mouth.

In 1919 Chicago's underworld big shot was "Diamond Jim" Colosimo. Colosimo had a plush restaurant on Wabash Avenue, just south of the Loop, and a clientele made up largely of slummers and thrill seekers, prostitutes, pimps and racketeers. The restaurant was only a blind. Colosimo's real business was running a string of brothels which by calculated spacing covered all sections of the city. It was a large business—too much for one man to look after—and Big Jim had a difficult time before he imported an aid from Brooklyn. He came from the Williamsburg district and for a time had been leader of the Five Points Gang. His name was Johnny Torrio.

It was Torrio who brought Capone to Chicago. Some say the motivation was Torrio's respect for Capone as a "gun", others say that Capone was in trouble in Brooklyn and Torrio extricated him. Whatever the reason, Capone came to Chicago in the summer of 1919. His initial job was managing one of the Colosimo-Torrio bagnios. His starting pay was $75 a week.

When prohibition—the "noble experiment"—became effective at midnight, January 16, 1920, gangdom seized its rarest opportunity. Colosimo reached out for a lion's share of the illicit booze business. His reach was long—some say too long; it extended to territory which had been pre-empted by others as ruthless and determined as he was. One story claimed that he was marked by the Mafia. Another rumor, equally persis-

tent, was that persons in his own organization—Torrio and Capone not excepted—felt that Colosimo's acquisitiveness imposed undue limitations on their ambitions for advancement. But if the reasons were obscure, the result was not. On a bright June morning in 1920, Diamond Jim was mysteriously shot to death. No one was ever prosecuted for the crime.

Diamond Jim had been a colorful character. He lived glamorously, and his young and charming widow, a former musical-comedy star, saw to it that glamour was not lacking in his obsequies. At his $20,000 funeral there were hundreds of sorrowing mourners—among them eight Chicago aldermen, three Cook County judges and two United States Congressmen.

On Colosimo's death Torrio took over. In Capone he had found a kindred ambitious spirit. He made him a partner and "cut him in" on the $100,000-a-year profit which was now rolling in from the well-organized traffic in girls and booze. Together Torrio and Capone expanded the business. They brought Al's brother Ralph, nicknamed "Bottles," into the business. They pushed out south and west into the controllable suburbs of Cicero, Burnham and Stickney, where they established a variety of liquor enterprises—alky-cookers, breweries which openly and without police interference turned out real beer, and rumrunning depots—and opened gambling parlors outfitted with slot machines, roulette wheels, faro, crap, chuck-a-luck tables and "bird cages."

By 1923 Torrio and Capone were the undisputed rulers of Cicero. In the spring of 1924 they elected mayor the man they had chosen and they named the chief of police. They could boast with every evidence of truth that they were untouchable in the Chicago area. It has been estimated that the gross take from their combined operations ranged from $2,000,000 to $5,000,000 a year. They had well over seven hundred perfectly disciplined employees and bodyguards. These men performed—or else. If anyone complained, became dissatisfied or acted queerly, he disappeared—was "rubbed out" in the gangland argot.

Capone enjoyed and indulged in extravagance. He traveled with his bodyguards in a steel-armored, seven-ton limousine. He threw fabulous parties at which there were often as many as a hundred guests, and he showered his guests with lavish souvenirs. For himself he bought expensively tailored suits by the half dozen and made-to-order monogrammed shirts by the dozen. He boasted of his millions. He had reached the pinnacle of gangdom power, and he was only twenty-five years old.

But there was a reverse side to the coin. Other organizations of gangsters were just as greedy and ruthless as Capone's. The leader of the toughest of these gangs was a fishy-eyed, sandy-haired, fearless young Irishman named Dion O'Banion. The blind to his business was a retail flower shop on the near North Side. His associates—as tough as the best from Chicago, New York or Detroit—included such worthies as George (Bugs) Moran, Vincent (The Schemer) Drucci and Earl (Hymie) Weiss (born Vojciechowski).

In the early days of prohibition Torrio, Capone and O'Banion had been partners, but they had fallen out, it seems, over the activities of Torrio's and Capone's other allies, the Genna brothers. The Gennas were alky-cookers and beer peddlers who had muscled in on O'Banion's North Side preserves. Protests to Torrio and Capone had done no good. O'Banion had declared his independence with the defiant utterance, "To hell with the Sicilians!" and had henceforth brazenly disregarded the Torrio-Capone boundaries. It was a declaration of war.

The Torrio-Capone army struck first. On the morning of November 10, 1924, while O'Banion was contentedly clipping the ends of a newly arrived batch of chrysanthemums, three well-dressed and harmless-looking Italians entered his flower shop, ostensibly as purchasers. They shot him to death. Torrio and Capone sent magnificent floral displays and attended the funeral. Torrio, Capone and Angelo Genna were questioned by the police. All had alibis. John Scalise, Albert Anselmi and Frankie Yale (Uale), well known as three of

Torrio's and Capone's most ruthless "choppers," were also questioned by the police. But there were no arrests and no one was ever prosecuted.

The failure of the law, however, did not mean there was to be no retribution. The O'Banion gang, under no illusions about who had done the killing, swung into immediate action. No sooner was its leader laid away in his solid copper-and-silver casket than the first of a dozen or more attempts was made to kill Capone. Gunmen in a closed car overtook his limousine early one evening, crowded it to the curb and raked it with bullets from windshield to rear bumper. Capone was fortunate enough not to be in the car; the chauffeur was seriously and permanently injured.

Two months later Torrio "almost got his." As he stepped from his automobile in a street directly behind his unpretentious South Side residence he was mowed down in a blast of shotgun fire from a passing car. Torrio was rushed to a hospital with four slugs in his jaw and neck and one in his shoulder. The slugs were said to have been poisoned with garlic. For weeks Torrio lay at the point of death. Two guards were posted day and night at the door of his hospital room for fear the avengers would return to complete their misson.

At the time of the shooting, Torrio was under bail on an appeal from a government sentence of nine months for operating a brewery. The appeal was quietly withdrawn, and when Torrio was ready to leave the hospital he was secretly removed to a cell in the Lake County jail at Waukegan. But even there Torrio was so nervous that he had bulletproof screens put on his cell windows.

Torrio was terribly frightened, but he kept within gangland tradition and refused to prosecute although a witness was prepared to identify "Bugs" Moran as the assailant. When he was released from jail, six weeks before his term expired, his friends spirited him to New York Harbor, where he, his wife and his belongings were safely deposited in a comfortable transatlantic liner bound for Italy. He remained "on vaca-

tion" for a couple of years; then, when he thought it was safe, he returned to Chicago.

Capone was not long in retaliating for Torrio's enforced departure. His pudgy finger pointed to Hymie Weiss, the "brain" of the old O'Banion gang, and "The Schemer" Drucci. At high noon on Michigan Avenue these two gangsters were made the targets of a fusillade of gunfire, but they miraculously escaped injury. The inevitable innocent bystander, however, got a bullet in one of his legs. Scalise and Anselmi were again tagged by the North Side gang as the "torpedoes" responsible for the shooting. The police rushed to the scene and arrested a man who was running away. He was known to be a Capone henchman, but there was no one to accuse him of anything and he was released almost immediately.

Now the offensive passed to the O'Banions. At dusk on a warm September evening a caravan of eight armored cars, led by Hymie Weiss, invaded Cicero and descended on Capone's "castle"—the three-story, steel-shuttered Hawthorne Hotel. Deliberately the occupants of the cars alighted, chose positions, brought out machine guns and sprayed the building from top to bottom with more than a thousand bullets. Several people were wounded.[1] Capone escaped injury by lying flat on his face on the floor of the coffee shop until he was assured by one of his bodyguards that the barrage was over.

Two months later Capone's chauffeur was "taken for a ride." His mutilated body, found in an abandoned cistern, testified to the torture he had undergone. The O'Banions had evidently tried to force the man to give information about Capone's whereabouts and habits.

Soon after the assault on the chauffeur the Capone crowd made its second attempt to get Weiss and this time succeeded.

[1] One woman had received a bullet wound in the eye. A well-authenticated story had it that Capone paid all her doctor bills—amounting to more than $10,000—and also paid the property damages of the storekeepers whose windows and displays had been caught in the shower of lead.

Ironically, the murder was baldly committed in the shadows of a court and a cathedral. Hymie was in attendance on the criminal court because one of his pals, a notorious beer-runner named Joe Saltis, was on trial for the murder of a rival beer peddler. During a court recess Weiss and four others—Sam Pellar, Weiss's chauffeur; Patrick Murray, a beer peddler; William W. O'Brien, Saltis' attorney; and Benjamin Jacobs, an investigator—stepped out of the North Side Criminal Court Building for a breath of fresh air and walked slowly up the street. When they reached the corner of the stately Holy Name Cathedral they were riddled by a hail of machine-gun bullets from a second-story window across the street. Weiss and Murray were killed; the other three were severely wounded. No one was ever prosecuted for this daylight murder.

In this underworld feud other gunmen—about an equal number from both gangs—lost their lives. Some of them were killed in the public streets, some in their doorways and some at the wheels of their expensive limousines. One of the victims was Capone's brother Frank. Capone himself had a succession of narrow squeaks but escaped unscathed. It was not his destiny to fall under a gunman's bullet.

The Chicago press reported that from 1923 to 1926 there were 135 gang killings. Seventy of the murdered men were persons which the papers called "big shots." Most of the killings went "unsolved," although there were investigations, a dozen or more arrests and a half-dozen indictments and trials. But there was only one conviction: a minor hoodlum named Vinci shot and killed the gangster Minatti while the latter was attending a public coroner's inquest. Vinci said that he did it to avenge his brother who had been killed by Minatti. The jury gave him twenty-five years.

One of the unsuccessful prosecutions was of a beer peddler and gangster named Doherty, who had been seen by half a dozen witnesses when he killed one of his competitors in Cicero. Doherty was prosecuted by Assistant State's Attorney William H. McSwiggin. He was acquitted. Four months

later, on the evening of April 26, 1926, McSwiggin, in the company of this same Doherty and two others of the "Klondyke" O'Donnell beer-peddling gang, made a trip by automobile to Cicero to call on one of O'Donnell's customers. As they alighted from their car they were machine-gunned by the occupants of another car which had driven up behind them. McSwiggin, Doherty and one of the others were killed.

The extra editions which headlined the triple murder reported that Capone himself had led the machine gunners who committed the murders. It was stated there was a witness ready to testify that Capone, his brother Ralph and three others had been seen in a near-by restaurant with machine guns in their hands less than an hour before the shooting. When the police arrived on the scene both Capones had disappeared.

Investigation disclosed that the O'Donnells had undersold Capone in Cicero and taken away a number of his customers. It was also a matter of public knowledge that McSwiggin had unsuccessfully prosecuted Capone's two "guns," Scalise and Anselmi, for the murder of two police sergeants. A complaint against Capone was sworn out and placed in the hands of the state's attorney. Two months later Capone showed up in the criminal court with his attorney and insisted the complaint be quashed. An assistant state's attorney acceded to the demand, saying that there was not sufficient evidence to hold Capone. Capone returned to Cicero.

He was once charged directly, if unofficially, with the murder of McSwiggin. McSwiggin's father was a sergeant of police. His own investigation apparently convinced him that Capone was the man responsible for his son's death. He boldly and publicly accused the gangster in his "castle" in Cicero. According to the story repeated later, Capone never flinched but took his revolver from his armpit holster, handed it to Sergeant McSwiggin and said, "If you really believe that, you ought to shoot me." McSwiggin did not shoot. If the story is true, it tells of the only courageous act on record in Capone's unsavory career.

During all this rivalry and bloodshed, Capone's business expanded and prospered. Branches were established in St. Louis, Newark, New Orleans and Atlantic City. Capone acquired interests in a number of dog-racing tracks in Cook County. He broke into the labor-union racket and thus obtained a handle for industry shakedowns. He also claimed a share of the "protection" racket and imposed on owners of laundries, cleaning-and-dyeing establishments and other small businesses compulsory insurance against bombing. In 1927 he gained a substantial interest in the largest chain of cleaning-and-dyeing plants in Chicago. His new partner, who previously had been sole owner of the business, said he gave Capone a share in return for protection against the criminal activities of unscrupulous competitors and their hired "wreckers." "Now," he said, "I don't need the police or the state's attorney or anyone else. I have the best protection in the world." If the press record can be believed, protection was needed. According to current report, Chicago, in one calendar year, had 115 mysterious bombings, and no one was brought to book for any of them.

All these "business" ventures increased Capone's profit. A writer for one of the weekly news magazines estimated that Capone's over-all take for 1928 was $105,000,000. The writer calculated that $60,000,000 came from beer and liquor, $25,000,000 from gambling and dog tracks, $10,000,000 from brothels and $10,000,000 from "miscellaneous sources."[2]

Despite his fortune, Capone was not happy. He lived in the shadow of the gun. Bodyguards flanked him wherever he went—to the theater, where on first nights he often bought an entire section of seats for his favorite male and female companions, or to the Chicago or Miami prize fights, where a similar contingent had the best ringside seats. As early as 1928 he was talking of retiring, of going to some peaceful spot where he would be just a plain (but rich) citizen rather than a target.

[2] No verification of these figures is possible. They may or may not be exaggerations.

Capone's efforts to find the haven he sought read like the wanderings of a man without a country. Los Angeles appealed to him, so he and his wife and a couple of bodyguards moved west. His coming, like everything else concerning Capone, had been advertised, and the publicity was unfortunate. At the Los Angeles station two plain-clothes men met him at the train to tell him he was an "undesirable" and would not be permitted to stay in the City of the Angels. Capone protested but the officers were firm. Still protesting and promising he would return, Capone and his bruisers were kept under observation until they were escorted to and safely deposited in an eastbound transcontinental flyer.

Al considered next the residential advantages of New York, New Orleans and Atlantic City, but found objections to each of these cities. He then looked toward Florida and recalled that on an earlier occasion St. Petersburg had impressed him as an ideal retreat for the tired businessman. He would go there. To celebrate his move he gave a big party in Chicago and described his plans jubilantly. The celebration was a mistake, for word of his move reached St. Petersburg before he did. The residents decided that having Capone in their midst would ruin property values; real-estate owners and their agents were warned that they should refuse Capone's bids for housing. So he made his journey to the city of sunshine, but he did not stay long. While he was there, the police dogged his heels and he was more uncomfortable than he had been in Chicago.

Capone next tried to settle in Nassau, but there too he was not given a chance. The strait-laced British authorities made it very clear to him that he was Uncle Sam's problem and that the islanders wanted none of him.

Capone's final choice was Miami. There he had slightly better luck. He rented a commodious bungalow in Miami Beach and prepared to settle down. But here too the visit was brief. In about two weeks the women's clubs, the garden clubs, the Chamber of Commerce and the church organizations discovered his presence; they joined together to protest

to the mayor, the state's attorney and the county solicitor against the residence of so notorious an outlaw as Scarface Al. Capone was "officially requested" to leave the city. Surprisingly he did leave, and without serious protest.

When Miami next heard of Capone it learned that through some adroit maneuvering he had acquired a villa on Palm Island, just off the Florida coast and opposite Miami. Palm Island was not within Miami's municipal jurisdiction but it was part of Dade County, and the county solicitor promptly suggested that Capone sell his place and leave. This time Capone was not compliant. He asserted that he was a substantial property owner, that he had never been convicted of a crime, that he was a victim of yellow journalism. He threatened to fight for his right to hold and live on his property, to appeal to the Supreme Court of the United States if necessary. The solicitor backed down. After all, as long as Al behaved himself and violated none of the Federal or state laws, the Florida authorities could not rightfully do anything to him.

In Florida Capone did behave himself. He was a familiar figure at prize fights and other sporting events. Although he entertained lavishly, he frequently contributed to charities and thus appeased the populace. Many of the prominent socialites of Miami and the beach enjoyed his bar, his table, his golf course and his swimming pool, and consciously or unconsciously rubbed elbows with the elite of Chicago gangdom.

But while Capone luxuriated in Florida and tried, at least seemingly, to detach himself from the pressures of his Chicago "businesses," gang warfare that was to implicate him raged on at home.

In the same year Capone moved to Palm Island, 1928, his close friend Tony Lombardo was killed. The murder was committed during the evening rush hour on the "world's busiest corner," the corner of State and Madison streets in downtown Chicago. Lombardo and two of his bodyguards were edging their way through the crowd when two men suddenly pressed against them. The crack of revolver shots cut

sharply through the normal street noises. Lombardo and his companions fell, victims of one of the boldest of all the gang killings. Lombardo had two bullets in his brain and died instantly. One of the guards, mortally wounded, died soon afterward. The other guard survived despite his wounds, but could give no description of the assassins who had escaped into the crowd. As usual, there were no arrests.

Lombardo's funeral, incidentally, touched off a new high in gangland post-mortem display. His silver casket was said to have cost $50,000. The flowers, which included a mammoth spray from Capone carded "My Pal," reputedly represented another $50,000. More than 20,000 people—among them many top-level politicians of both parties—joined in paying homage to the dead gangster. The funeral cortege was over two miles long. Only one honor was missing. Lombardo had professed to be a Catholic, but, on the order of the Catholic archbishop, the diocesan clergy had been forbidden to conduct funeral services for notorious gangsters in the Catholic churches. Lombardo was buried from a mortician's chapel. To compensate, an American flag surmounted by a gilded eagle lay at the head of the casket and an Italian flag topped with a cross and a crown lay at its foot.

Lombardo had been president of the Unione Sicilione. To say that the direction of this association was a coveted distinction would be a gross understatement. Men literally fought and died for it. Capone fought for it. The Gennas fought for it. The Aiellos fought for it. Control of the Unione Sicilione meant control of thousands of alky-cookers and wine and beer distributors. It meant also, political domination of a numerically important constituency in several of the city's wards. Mike Merlo, its first president, died in 1924. Strange to relate, he died a natural death and was apparently mourned sincerely by his constituents. His successors—Angelo Genna, Sam Samoots Amatuna, Lombardo, Pasqualino Lalordo and Joseph Quinta—were killed after conspicuously brief tenures in office. Tony Lombardo had been Capone's man. Then, in 1929, came Joseph Aiello. Aiello, if he did business with any

one, did it with "Bugs" Moran, successor to O'Banion. Capone had lost his hold on the Unione Sicilione.

The killings for the mastery of the Unione Sicilione made up but a small part of the total gang slaughter. There was an unbroken succession of them—eight, ten, twelve or fourteen mysterious murders a month. Some were Capone men. Some were remnants of the old O'Banion gang—now called the "Bugs" Moran gang. Others were rival beermakers, rival beer peddlers, rival whiskey runners, rival highjackers, rival musclers-in for labor control.

Capone, though he was known to be in Florida, was justly or unjustly credited with a hand in all the killings. A persistent rumor blamed him for planning the famous "Austerlitz of Gang Killings," as one weekly magazine called it, while basking in the Southern sunshine. This slaughter, which took place in February 1929, was the climax of the gangland feud in Chicago.

Moran's henchmen were known to hang out in a garage on North Clark Street about three miles north of Chicago's Loop. In broad daylight on St. Valentine's Day five men—three of them dressed in stolen or specially made police uniforms—entered the front door of the garage. The details of what actually happened will never be told, but the discovery of seven bullet-riddled bodies—five of them Moran gangsters, one of them the owner of the garage and one a young neighborhood optometrist who "liked to hang around with gangsters"—showed all too clearly the consequence of the visit. The seven had been lined up, faces to a brick wall, and machine-gunned in cold blood. One was still alive when the bodies were found, but he either could not or would not tell who did the shooting. Moran's involuntary comment when he viewed the shambles was probably significant: "Only Capone kills like that!"

Moran himself and two of his pals had escaped death by a matter of minutes. They had just returned from superintending a highjacked liquor delivery when they noticed the supposed policemen enter the garage. Thinking it was a

"pinch," Moran and his friends concealed themselves until the "policemen" emerged from the garage. They watched the three uniformed men prod the two men in ordinary suits out the door, and suspected nothing. The murders, from beginning to end, had been coolly and cleverly thought out.

The public outcry over the St. Valentine's Day Massacre was tremendous. Shock and anger exploded in the news and editorial headlines: ARE WE UNDER GANG RULE? RETURN TO FRONTIER LAWLESSNESS . . . COMPLETE BREAKDOWN OF LAW AND ORDER . . . POLICE UNABLE TO COPE WITH MASS DAYLIGHT MURDER. There was a great show of police activity. A dozen suspects were arrested and questioned, including Scalise, Anselmi and Jack McGurn (born De Mora)—all Capone men.

A grand jury apparently thought, or was assured, that there was sufficient evidence to warrant the indictment of Scalise and McGurn. Their bail was fixed at $50,000 and promptly furnished. But proper legal process was allowed to go no further.

Gangland enforced its own process. On the eighth of May the battered and bullet-riddled bodies of the accused John Scalise, Albert Anselmi and Tony Quinta, also known to be a Capone "gun," were found in a roadside ditch in northern Indiana.[3]

McGurn was luckier than his codefendants. He profited by a beneficent Illinois statute which requires the dismissal of a criminal case (misdemeanor or felony) if the defendant at four successive monthly terms of court demands and is unable

[3] Another story which persists in the accounts of Capone's activities gives an entirely different and more harrowing account of the deaths of Scalise, Anselmi and Quinta, and the reasons for them. These three, so goes the story, had decided to break with Capone after the St. Valentine's Day Massacre and had even lent themselves to plots against his life. Learning of it, Capone had called a meeting of his faithful and the three suspects at a roadhouse which he controlled at Wolf Lake, near the Indiana line. When all had dined sumptuously Capone publicly charged Scalise, Anselmi and Quinta with their treachery and then either he or one of his henchmen seized a baseball bat and beat their brains out. They were then shot and their bodies placed in an automobile which was run into the ditch where they were later found. Some corroboration is given to this tale by the coroner's findings: the men's skulls had been fractured in many places as though by a blunt instrument, and there were wounds on the back of the left hand of one of the men such as might have occurred if he had lifted his hand to ward off a blow.

to get a trial. McGurn made three successive-term demands. Each time the state was not ready and the case was continued. At the fourth term the demand was renewed, and the state's attorney again declared the state was not ready for trial. The court had no alternative but to dismiss the case. McGurn walked out of court a free man. No one was ever prosecuted for the St. Valentine's Day murders.

The threats and activities of the Moran mob, relayed to Capone, threw him into a state of mortal terror. The Palm Island residence took on the aspect of a fortress; the guards were redoubled. Night or day, Capone was never alone. If he is to be believed, it was while he was in Florida suffering constant dread of an atack on his life that Capone conceived the idea of insuring his safety by bargaining for peace with his enemies.

Atlantic City has been the scene of many conventions, but it is certain that the city of skyscraper hotels, boardwalks, honky-tonks, beaches and bathing beauties never witnessed a stranger or more sinister aggregation of human beings than assembled there in June of 1929. At that time, according to Capone's account, the "Big Four" of Chicago gangdom assembled—Capone, Torrio, Moran and Aiello. Each was accompanied by his chief lieutenant, and all were intent on a merger of interests in Chicago's criminal potential, an agreed split of profits and a cessation of gang warfare. Bygones, including the St. Valentine's Day Massacre, were to be forgiven and forgotten. A new day of "live and let live" was to dawn.

The conference lasted three full days, and, according to Capone, its result was eminently satisfactory. A formal document was prepared and signed by all the high contracting parties. By its terms there were to be no more killings. All controversies were to be settled by an executive committee which would enforce its decrees and discipline recalcitrants. Johnny Torrio was to rule as chief arbiter of the new Syndicate. Individual roles were assigned. There was to be a monthly audit which the Big Four would supervise. All profits, after the deduction of approved "legitimate expenses,"

were to be divided among Capone, Torrio, Moran and Aiello.

After the conference all the negotiators except Capone and "Big Cline," one of his bodyguards, left hurriedly for Chicago. Capone and Cline lingered at the beach for a day and then started by automobile for North Philadelphia. From there Capone intended to take a 3:00 P.M. train for Chicago. The plan miscarried. Fifteen miles outside North Philadelphia the car broke down, and repairs took so long that Capone and Cline missed their train. While waiting for the next one, at 6:30, they went to a movie at Nineteenth and Market streets, about four miles from the North Philadelphia station. Half an hour before train time they emerged from the theater and were accosted at the door by two Philadelphia detectives.

"You're Al Capone, aren't you?" asked Detective Malone.

"Yes," Capone replied. "Who are you?" The detectives showed their badges. "Oh, bulls," said Capone. "All right, here's my gun." Capone handed over a .38-caliber revolver. Cline, at his boss's direction, surrendered his gun.

The two were taken into custody. The following day an indictment was found against them charging them with carrying concealed weapons. They were taken immediately before a judge of the municipal court. Lawyers appeared for them but, before a word of testimony had been offered, both pleaded guilty. The officers told their story for the record and the judge sentenced both men to a year in jail. They were immediately taken to Holmesburg Prison. All this happened within twenty-four hours.

Newspapers throughout the country heralded the arrest and conviction at long last of the hitherto immune gangster. The Philadelphia authorities were commended for their zeal. From other sources—both friends and enemies of Capone—there was a different reaction. The whole thing was "phony." Capone, they said, was in mortal fear of death, despite the peace pact, and had arranged for his arrest in order to find sanctuary. The claim, fantastic as it might appear, found support in the comments of Philadelphia's Mayor Harry A.

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Mackey. "From reports I have received," said Mr. Mackey, "Capone was really running away from a gang which was out to kill him. If he hadn't been glad to go to jail, I think he would have fought the case to the last."

Capone himself lent color to the story. After he was arrested he talked, mostly to Philadelphia's Director of Public Safety, Major Lemuel B. Schofield. The interesting interview was featured in the Philadelphia *Public Ledger*. "I had a most interesting discussion with Capone," said Major Schofield. "He was in a reminiscent mood and seemed to be at a point where he was anxious to be at peace, not only with gangsters but with the law." Schofield quoted Capone as saying:

I'm like any other man. I've been in this racket long enough to realize that a man in my game must take the breaks, the fortunes of war. Three of my friends were killed in the last three weeks in Chicago. That certainly isn't conducive to peace of mind. I haven't had any peace of mind in years. Every minute I was in danger of death. Even when we're on a peace errand we must hide from the rest of the racketeers, even to the point of concealing our identity under assumed names in hotels and elsewhere. Why, when I went to Atlantic City I registered under a fictitious name.

Capone told Schofield that for two years he had been "trying to get out of the racket." Again Schofield quoted Capone:

Once in the racket you are always in it, it seems. The parasites will trail you begging for money and favors and you can never get away from them no matter where you go. I have a wife and a boy who is eleven—a lad I idolize—and a beautiful home at Palm Island, Florida. If I could go there and forget it all I would be the happiest man in the world. I want peace and I will live and let live. I'm tired of gang murders and gang shootings. I spent a week in Atlantic City trying to make peace among the various gang leaders of my city. I have the word of each of the men there will be no more shootings. I am satisfied that the odds are in my favor but it's a tough life to lead. You fear death every moment and, worse

than death, you fear the rats of the game who would run around and tell the police if you don't constantly satisfy them with money and favors.

Capone's lament ended on a particularly plaintive note:

I was never able to leave home without my bodyguard. He has been with me constantly for two years. I have never been convicted of a crime, never, nor have I ever directed anyone else to commit a crime. I don't pose as a plaster saint, but I never killed anyone. And I am known all over the world as a millionaire gorilla.

Capone's confinement does not appear to have been attended with the usual prison restrictions. He was allowed to make regular long-distance telephone calls to his first lieutenant, Jake (Greasy Thumb) Guzik, in Chicago. The warden's office was made available to him for private conferences with his Philadelphia attorneys. Guzik, Frank Nitti and Ralph Capone visited the lawyers at regular intervals and received the big boss's instructions.

Capone was released from Holmesburg on March 17, 1930. He had served his full sentence with the prescribed time off for good behavior. No doubt Al congratulated himself on his continuing good terms with the law. It had just given him refuge and it was not hounding him about an old charge that had never been settled. In February of 1929, while he was still in Florida, Capone had been served a regularly issued subpoena to appear before a Federal grand jury sitting at Chicago. He had found it inconvenient to visit Chicago at the time and, on the day before he was to come before the jury, his attorneys had requested and been granted a postponement on the ground of Capone's bad health. The attorneys submitted an affidavit from a Miami doctor and a letter from Capone himself stating that Capone had been under continuous medical care since January 13, 1929. Bronchial pneumonia and pleurisy, which caused an effusion of fluid into the chest cavity, had confined him to his bed for six

weeks. Upon reading the doctor's recommendation that "there would be grave risk of a collapse that might result in . . . death from a recurrent pneumonia," the court delayed the hearing indefinitely. Nothing more had been done about the charge and seemingly never would be.

But peace of mind did not last long. Out of prison less than two months, Capone again made the headlines. A reputed friend of his, a newspaper police reporter named Jake Lingle, had been assassinated while passing through a street underpass on his way to a suburban train. The cry of "Who killed Jake Lingle, and why?" filled the newspapers as had the earlier cry of "Who killed McSwiggin?"[4]

Lingle's murder and the resulting campaign for prosecution from the newspaper for which he had worked stirred the citizenry to action. A group called the Secret Six, sponsored by the Chicago Association of Commerce and Industry, headed by stalwart, incorruptible Colonel Robert Isham Randolph and plentifully supplied with privately contributed funds, entered the fight for a cleanup of gangdom.

The Secret Six were practical and realistic. They knew better than to rely on the state and local governments for effective aid. Help, if it was to come from anywhere, had to come from the Federal Department of Justice. Fortunately for the cause of good government, the United States Attorney for the Northern District of Illinois, Honorable George E. Q. Johnson, was a man of high integrity, industry, persistence and determination. The agents of the criminal investigation division of the Bureau of Internal Revenue and the Department of Justice had already initiated thoroughgoing inquiries for evidence of violation of prohibition and income-tax laws by Chicago gangsters. Johnson was glad to combine the efforts of his agents with those of the Chicago citizens. From

[4] The startling disclosures which followed the hunt for Lingle's murderers left no doubt that he had been killed at the direction of one of the many gangsters with whom he was shown to have been associated. There was no evidence, however, implicating Capone or any of his gang in the killing. One of the Leo Brothers was arrested, tried and convicted for the actual killing (347 Ill. 530).

this time on there was close and effective co-operation between the Federal officials and the Secret Six.

Capone soon became concerned by reports that agents were investigating his affairs. They had already caught up with beer-runners Frankie Lake and Terry Druggan, with Jack McGurn, with Frank (The Enforcer) Nitti, with Capone's brother Ralph and with Capone's friends, Joe Fusco and Jake (Greasy Thumb) and Sam Guzik. Capone hastened to employ an income-tax "specialist" and to attempt a compromise.

The Federal investigators, on their side, were not finding it easy to prove something on Capone. To any but the experienced, resourceful and persistent men from the Federal investigating offices, unearthing evidence to sustain a conviction would have been an impossible task. Capone had kept no personal books, had no bank accounts in his own name, had never made a financial statement and had never filed an income-tax return. It was common talk that he ran a string of fancy brothels, that he was owner or partner in a half-dozen gambling houses and was interested in over a thousand bookie joints, that he operated several dog tracks, that he controlled a number of breweries and sponsored twelve hundred speakeasies and that he got a cut on every case of whisky that found its way into Cook County. But no one who knew of these ownerships and interests would come forward to testify to them. There was also abundant evidence of Capone's regal style of living: his well-appointed home on Prairie Avenue in Chicago, his estate at Palm Island, Florida, his huge food bills, his lavish banquets and entertainments, his largess, his high-powered armored automobiles, his retinue of henchmen and his fantastic expenditures for personal wearing apparel.

To the man on the street this might be proof enough that there was an income and a big one, but the government's investigators had to prove by *direct* corroborative evidence, calculated to satisfy a jury of twelve beyond a reasonable doubt, that in one or more specified years Capone had derived from defined sources a net income subject to Federal tax.

For nearly two years the agents worked. Avenue after av-

enue closed at a dead end, but finally the break came. Special Agent Frank J. Wilson told of it much later in one of the national weekly magazines.[5] Wilson was rummaging through a mass of old books and papers which had been seized in a raid on a Cicero gambling house, the Ship, just after the murder of Assistant State's Attorney McSwiggin. The Ship was one of Capone's reputed holdings, and Wilson thought there might be a clue among the papers. His diligence was rewarded. He found a dusty cashbook containing a record of the joint's income.

Painstakingly Wilson and his assistants collected handwriting samples from every hoodlum known or suspected to have had associations with Capone. These samples came from voting registers, police-court bonds and bank-deposit slips. After a long process of comparison and elimination the agents discovered in a Cicero bank a deposit slip which matched the handwritten entries in the Ship's cashbook. The handwriting was that of one Lou Schumway. It was easy to establish that Schumway was a trusted henchman of Capone's who had once been a bookkeeper at the Ship.

Wilson traced Schumway to Florida and found him at a dog track at the Biscayne Bay Kennel Club. Schumway was frightened into talking. He identified numerous entries in the cashbook as his and, in Wilson's words, generally "played ball" with the government. The government stored him in California for "safekeeping" until he should be needed.

Continued examinations of transactions in Cicero banks led to an investigation of a mysterious "J. C. Dunbar" who had brought upward of $300,000 in cash to one of the banks to purchase cashier's checks. Dunbar turned out to be Fred Ries, a former employee of one of Capone's gambling houses. Ries was traced to St. Louis and questioned. When he refused to talk about his past affiliations, Wilson and an assistant agent arrested him and had him committed to what Wilson described as a "special jail" in Danville, Illinois. The only

[5] *Collier's* for April 26, 1917, pp. 14, *et sec.*

"special" thing about it seems to have been its extraordinary infestation with vermin which so harassed Ries that after five days he was prompted to change his mind and talk. He was "sneaked into the grand jury room in Chicago" where he gave his testimony. Then he was packed off to South America with government agents to guard him until he was needed in court. The Chicago Secret Six supplied the money for the expedition.

There was other evidence—a good deal of it—submitted to the Federal grand jury, and on June 5, 1931, that body returned indictments charging Alphonse Capone—alias Alphonse Brown, alias Al Brown, alias Scarface Brown, alias Scarface Capone, alias A. Costa—with twenty-three separate violations of the internal-revenue laws. He was charged specifically with failing to file an income-tax return for the years 1928 and 1929 and with attempting to evade the payment of income taxes due for the years 1925, 1926, 1927, 1928 and 1929. Capone's bond was fixed at $50,000. It was provided for him and he was released pending the outcome of the trial.

A week later the Federal grand jury returned an indictment against Capone and fifty-nine others, charging them with conspiracy to violate the Federal prohibition laws. The list of the defendants constituted the 1931 *Who's Who* in the Chicago booze racket. Capone was named in thirteen of the nineteen overt acts charged. His bail for the income-tax case was allowed to stand as his bail for this second charge.

These were not the only charges made against Capone at this time. A by-product of the governments' investigations was the revelation that the Palm Island squire had not been so ill in February 1929, when the grand-jury subpoena was served, that his life would have been jeopardized by a trip to Chicago. Indeed there was abundant evidence to show that on March 5, 1929, when his accommodative physician had sent the affidavit to secure a postponement of the hearing, Capone was not and had not been suffering from bronchial pneumonia nor from pleurisy with an effusion of fluid into the chest cavity. Furthermore, he had not been confined to his bed for six

weeks preceding February 23, 1929. On February 2, in fact, he had taken an airplane trip to Bimini; on February 8 he had gone with a party of friends on an ocean trip to Nassau and spent four days there; on February 14 he had had a two-hour conference (subject undisclosed) with the county attorney of Dade County; and in January, February and early March he had visited the Hialeah race track at least fifteen times. During all of this time, according to the government's shadows, Capone had appeared and acted as if in perfect health.

On the basis of these facts, the Government filed an information against Capone on February 2, 1931, and he was ordered to show cause why he should not be adjudged guilty of contempt of court. At the hearing three weeks later ten Government witnesses took the stand to testify against him. Capone offered practically no defense, and the Court found the now thoroughly frightened Scarface guilty and sentenced him to six months' confinement in the Cook County jail.[6]

From the day the indictments against Capone were returned, there were persistent rumors that he intended to plead guilty. When he appeared with his lawyers before District Judge Wilkerson on June 15 he confirmed the rumors by entering formal pleas of guilty to the indictments charging him with violations of the income-tax and the prohibition laws. Judge Wilkerson entered the pleas and set the disposition of them for June 30.

On June 29 Capone's attorney, Michael J. Ahern, appeared in court and requested a continuance. Capone, he claimed, had become involved in some civil litigation in Florida which required his presence there. The Government agreed to a postponement until July 30 and the Court entered an order to that effect.

Had that been all, there would have been no occasion for the concern which permeated the Capone camp after

[6] Capone appealed and was allowed his liberty on a $5,000 bond. The appeal was dismissed by the Court of Appeals on June 20, 1932. By an order entered October 24, 1931, in the district court, this sentence was made to run concurrently with Capone's sentences in the income-tax cases.

the hearing. But apprehension arose because of an exchange between Ahern and the Court. Attorney Ahern suggested to the Court that on pleas of guilty similar to Capone's, eighteen months was the longest sentence that had ever been imposed. Judge Wilkerson, with what one of the newspapers characterized as a "mysterious seriousness," replied, "There are conspiracies and conspiracies and tax violations and tax violations, but I'll hear you fully on July 30." The perturbation of Capone and his counsel was measurably increased when the judge, on July 16, directed United States Attorney Johnson to "have all of the income tax witnesses in court on July 30," and announced that he expected to have a full hearing.

All parties were present in court on July 30. At the outset the judge said that in addition to hearing the Government's witnesses he would expect also to hear from the defendant if he was pleading for a mitigation of punishment. All of this, while perhaps out of the ordinary, was strictly in accordance with law. The trial judge has the responsibility for sentences on a plea of guilty and has the right, if not the obligation, to advise himself fully of all the facts and circumstances before passing sentence.

Mr. Ahern did a quick shift and told the Court he had never intended to enter an unqualified plea of guilty. He said that he, the District Attorney, the Attorney General and the Assistant Secretary of the Treasury had agreed on a recommendation which District Attorney Johnson would make to the Court, and he expected the Court, under the usual practice, to follow it. The "compromise," he added, took in both Capone's civil and criminal liability.[7] He concluded that if he had had any idea the Court would not follow the District Attorney's recommendation he would never have pleaded his client guilty.

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[7] The exact terms of the recommendation were never publicly disclosed. It was freely rumored that it involved the settlement of the civil liability for a figure running into the hundreds of thousands, and a penitentiary sentence—to cover both the income-tax and prohibition indictments—of three years.

Judge Wilkerson answered that he would give due consideration to recommendations made by the United States Attorney, but would not obligate himself to follow them. He reminded the attorney that the responsibility for the sentence was his and his alone after he had fully informed himself of the facts. "And," said the Court, "if the defendant asks leniency he should be ready to answer all proper questions put to him by the Court touching the matter he has confessed in his plea."

Mr. Ahern then moved to withdraw the pleas of guilty in all the pending cases, and the Court set the hearing of that motion for September 8. On that date Judge Wilkerson filed a memorandum restating his position. "The Court," the paper read, "has ruled that all pleas of guilty must be unconditional, and that in a hearing thereon there can be no understanding which precludes the Court from ascertaining the facts and entering at the conclusion of the hearing the judgment which is proper under the facts. But," he added, "there being no objection by the United States, the motion to withdraw the pleas of guilty will be granted."[8]

On September 10 the pleas of guilty were formally withdrawn and, by leave of Court, demurrers to the income-tax indictments were heard and overruled. The two income-tax cases were consolidated for trial and set for hearing on October 6.

At 10:00 A.M. on the day appointed, counsel for the Government and defendant Capone, accompanied by his counsel and bodyguard, worked their way through the crowded corridors to District Judge Wilkerson's courtroom and the trial began.

This trial brought together a judge and lawyers of exceptional competence. A contemporary newspaper account of the trial referred to the presiding jurist and the attorneys, for both the Government and the defense, as "the cream of the bar." Appearing for the Government were United States

[8] The indictment charging Capone and others with violations of the prohibition law was never tried.

Attorney George E. Q. Johnson, Special Assistant Attorney General William J. Froelich and Assistant United States Attorneys Dwight H. Green, Jacob I. Grossman and Samuel G. Clawson. Michael J. Ahern, who had represented Capone in the preliminary actions, was now associated with a second defense attorney, Albert Fink.

Judge James H. Wilkerson was one of the best-qualified lawyers ever appointed to Federal District judgeship. As a practicing attorney he had been actively engaged in the trial of important civil and criminal cases. He had made a distinguished public record as United States Attorney and as chairman of the Illinois Commerce Commission. In the eleven years he had been on the Federal bench, he had established an enviable reputation for integrity, ability, judicial poise and impartiality.

Mr. Johnson had served for five years as United States Attorney and in that service had gained a reputation as an honest, able and forceful advocate.[9] Mr. Johnson's principal assistant, Mr. Dwight H. Green, was an experienced and able trial lawyer.[10] Mr. Grossman, Mr. Clawson and Mr. Froelich were all lawyers of recognized ability.

The array for the defense was equally impressive. Michael J. Ahern was one of Chicago's most erudite and successful trial lawyers. Albert Fink was a distinguished criminal lawyer with a record of many notable successes.

But it was the defendant himself, rather than the distinguished presiding jurist or the lawyers, who drew the attention of the curious onlookers. "Scarface Al" was easily identified. His hulking frame, his broad, scarred and heavy-jowled face, closely shaved and powdered to a chalklike whiteness, and his faultlessly tailored clothes, colored silk shirt, polished tan shoes and pearl-gray spats set him apart from the more

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[9] Shortly after the Capone trial Mr. Johnson was given an interim appointment by the Republican President to the Federal District bench. He failed, however, to obtain later confirmation from a predominantly Democratic Senate.

[10] Dwight H. Green was later United States Attorney and Governor of Illinois (1940-1948).

modestly attired lawyers. And he was attended by an equally dapper personal bodyguard, a nattily dressed, well-groomed, swarthy young athlete named Phil D'Andrea. D'Andrea followed closely on Capone's heels, both inside and outside the courtroom, and during the trial he occupied a chair immediately behind the defendant.


*(The Chicago Daily News, October 10, 1931.)*

Sketch of courtroom during Al Capone's trial. Capone, in black, is seated left of center; Judge Wilkerson is presiding; and Albert Fink, defense attorney, is pleading.

Under the questioning of the Court, the impaneling of the jury proceeded with dispatch. By midafternoon three retail grocers, two journeyman painters, a patternmaker, a real-estate broker, a stationary engineer, a hardware merchant, an insurance agent, a farmer and a clerk had been sworn to give the defendant a fair and impartial trial.

Assistant District Attorney Green outlined the Government's case in an opening statement. There were, he said, two indictments being tried together. One contained a single count and related to the year 1924; the other contained twenty-two counts and related to the years 1925, 1926, 1927, 1928 and 1929. The prosecutor emphasized that Capone had filed no income-tax returns and had paid no income taxes whatsoever for the years 1924, 1925, 1926, 1927, 1928 and 1929, whereas his income and taxes due had been:

For 1924, net income $123,101.89; evaded tax, $32,489.24;
For 1925, net income $257,285.95; evaded tax, $55,365.25;
For 1926, net income $195,677.00; evaded tax, $39,962.75;
For 1927, net income $218,057.04, evaded tax, $45,527.76;
For 1928, net income $140,536.93; evaded tax, $25,887.72;
For 1929, net income $103,999.00; evaded tax, $15,857.76.

Twenty-one of the counts, explained the prosecutor, charged felonies which carried separate penalties of a five-year imprisonment or a fine of $10,000, or both. Two of the counts charged a misdemeanor—failure to file a return for the years 1928 and 1929—and each carried a penalty of a year in jail or a fine of $10,000, or both. Mr. Green then proceeded to inform the jury that the Government was not required to prove the exact amounts of income charged; it was necessary only to prove that the defendant had earned taxable income during one or more of the years in question on which he had paid no tax. The Government, he declared, would make that proof.

The evidence, said the prosecutor, would show that the defendant handled all his business transactions by cash or by using the checks of other persons. "Carrying on his business in this manner was part of the scheme of the defendant to conceal and cover up his income," it was asserted. The evidence would further show, said Mr. Green, that the defendant, in his own name and in fictitious and real names of others, negotiated large sums of money by Western Union telegraph. By this method, for example, the defendant re-

ceived approximately $67,000 in the year 1928 and about $14,500 in the year 1929. This was, concluded Mr. Green, "a most unusual means to carry on transactions in a legitimate business."

The first Government witness called was the director of the Income Tax Division of the Bureau of Internal Revenue of the First Illinois District, Charles W. Arndt. Under Mr. Green's direct examination he testified that he had carefully examined the Bureau's records for the years 1924 to 1929 and that neither Alphonse Capone, Alphonse Brown, Al Capone, Al Brown, Scarface Capone, Scarface Brown, A. Costa or Snorky Capone had filed an income-tax return for any of those years.

Two men who lived in the suburban area west of Chicago testified to their participation in May 1925 in a citizens' raid on a gambling house known as the Hawthorne Smoke Shop in Cicero. The raid was initiated by a complaint for a search warrant sworn out by representatives of a voluntary law-enforcement agency called the Southwest Suburban Ministers and Citizens Association. The object of the organization, testified Chester Bragg, one of the witnesses, was "to make the western suburbs of Chicago fit places in which to live and raise children." Bragg was one of the raiding party and stood just inside the street door to prevent unauthorized persons from entering. He said he had just taken up his position when he "noticed a powerful man outside trying to force his way in." The witness, whose language did not seem to have been particularly improved by his associations with the suburban churchmen, resented the intrusion and demanded of the would-be door crasher, "What the hell do you think this is—a party?" And the big man, according to Bragg, replied, "Well, if it is I ought to be in there. I am the owner of the place." Bragg said he then recognized the man as Al Capone and let him in. He said he followed him upstairs and heard him scold and threaten another of the raiders, the "Reverend Mr. Hoover," pastor of the Berwyn Congregational Church. Capone was quoted by the witness as saying,

"Why can't you lay off me? Why are you always picking at me?" When Hoover replied, "We're not picking on you at all," Capone threatened, "You've pulled the last raid on me you're ever going to pull."

Bragg described the "upstairs place." "There were pool and billiard tables and a lot of other equipment that I was not familiar with—a roulette wheel, a chuck-a-luck table and racing forms." Bragg added additional testimony to illustrate Capone's elusiveness and the local law's shortcomings. He stated that a chief of police, a police magistrate, two patrolmen from a near-by suburb and a sergeant of police from the Cook County State's Attorney's office arrived on the scene with a warrant for Capone's arrest "some hours afterwards." Capone had, of course, disappeared. "The follow-up," said Bragg, "was a rotten job."

Although Mr. Ahern's skillful cross-examination developed numerous uncertainties and inconsistencies in Bragg's recollection of some of the details of his direct testimony, the advantage, if there was any, was mitigated by the witness' dramatic statement of what had happened to him after the raid. "When I came out of the place," said Bragg, "I was set upon by about a thousand hoodlums. I was slugged over one ear. My nose was broken with a blackjack. One of my eyes was blackened—maybe two eyes, and I had to be taken to a doctor in Berwyn."

The other witness who had participated in the raid, a machinist named David Morgan, corroborated Bragg's story but was less certain of whether Al Capone was the man who had protested the raid and said he was the owner of the place.

The first of the Government's "star" witnesses was L. H. (Lou) Schumway. He was examined by Assistant District Attorney Grossman. Schumway testified that he "kept the sheets" and did the bookkeeping in five or six gambling houses in Cicero during 1924, 1925 and 1926. One of these was the Hawthorne Smoke Shop. The managers of the place, when he worked there, were Pete Penovich and West Side Frankie Pope. Jake (Greasy Thumb) Guzik came in fre-

quently and the defendant Capone was there practically every day. The witness explained the layout: the gambling wheels, bird cages and horse-racing sheets were kept in the front rooms, while the money, books and accounting were handled in a rear room. "I often saw Mr. Capone in this rear room when we were going over the books and the money," Schumway said.

The prosecutor then produced a well-worn account book and had the witness identify the handwriting of various entries in 1924, 1925 and 1926. Some were in the handwriting of the witness; some were in the handwriting of Benny Pope, a brother of West Side Frankie Pope; others were in the handwriting of Jake (Greasy Thumb) Guzik. Capone's name appeared frequently as the recipient of cash.

Schumway testified that the money taken in at the Hawthorne Smoke Shop was transferred daily to a café in the Subway, another gambling parlor four doors up the street from the Smoke Shop. Capone, said the witness, showed great interest in this daily transfer of funds and personally superintended the removals. "Capone," explained Schumway, "was always worried about a 'stick-up.' "

The witness remembered the ministers' raid on the Smoke Shop in 1925. "What happened after that?" queried the Government attorney. "Oh, we just packed up and moved across the street and opened another gambling place" was the blithe reply. Charles Fischetti, he added, "sneaked out with the money."

Schumway's most solid contribution to the accumulating evidence against Capone was his statement, based on his recollection and the book entries, of the actual income of the Hawthorne Smoke Shop and the other Cicero gambling parlors where he worked. He testified they had a net profit of $300,250 in 1924, $117,460 in 1925 and $170,011 in 1926.

The cross-examination of Schumway accomplished but little. The witness did admit that his testimony concerning Capone was based only on hearsay and the circumstances he had related. He had no proof that Capone received any of the

profits from the Cicero gambling places. He admitted also that Capone himself frequently placed cash bets, the same as any other patron, on the horses running at the various tracks which were listed on his sheets.

Miss Helen Alexander, an employee of the Pinkert State Bank in Cicero, testified the defendant Capone and one Louis da Cava had a joint safe-deposit box in the bank's vaults from April of 1926 to April of 1927. During that year they came to the bank and opened the box many times.

The Government next called four employees of the Bureau of Internal Revenue to testify to the activities of one Lawrence B. Mattingly, the income-tax expert engaged by Capone in March of 1930 to work out a "compromise" of the government's income-tax claims. It was disclosed that Mr. Mattingly had had several interviews with a group of subordinate bureau officials, had allowed them once to interrogate Capone and had submitted a written statement to them.

This letter was produced, identified by the witnesses and offered as evidence of Capone's efforts to evade taxation. Mr. Ahern and Mr. Fink objected violently. They protested that the letter and Capone's and Mattingly's oral statements had been made in a bona fide attempt at a compromise of a pending, disputed claim, and that as such both the written and the oral statements should be privileged and not used as evidence.

The two bureau agents stated that both Mattingly and Capone had been warned before they made their statements that nothing they said would be considered privileged, that anything they might offer could be used against Capone in a later criminal proceeding.

There were long disputes on the admissibility of the evidence out of the presence of the jury. When counsel had been fully heard, Judge Wilkerson ruled the statements were admissible on the ground that a compromise, in the legal sense, meant a meeting of opposing interests, where both sides, properly authorized, come together to settle a genuinely disputed claim. Those elements, he said, were lacking in the case before him.

Capone and his agent, both uninvited, had approached minor government officials and made the statements, although they had been warned that any declarations might be used against Capone.

It was a severe blow to Capone's defense when Mr. Clawson, who presented this part of the Government's case, read Mattingly's letter to the jury. The letter stated that Capone had no taxable income in 1924 and 1925, for at that time he was working for Johnny Torrio at a salary of $75 a week. Then, and this was the crucial part, it admitted unqualifiedly that Capone had had a net income of not more than $26,000 in 1926, of not more than $40,000 in 1927 and of not more than $100,000 in both 1928 and 1929. There was indisputable confirmation of the Government's earlier testimony that Capone had never filed an income-tax return and had earned a taxable income.

Stenographic notes had been taken of the various conferences between Mattingly and Capone and the bureau's agents. These too were introduced as evidence. According to this record, Mattingly had stated that Capone had kept no books and had never had any bank accounts. It was impossible, he said, to determine exactly what his income had been during the years in question. He had been working on the case for months and the figures he had given the government were his best estimates. Capone was willing to acknowledge that taxes were due on those amounts and had the cash in hand to pay them.

Mattingly admitted further that Capone's gross income was probably much larger than the estimates he had submitted—though not nearly so high as was commonly reported. He explained that the profits of the Syndicate which ran the gambling enterprises in Cicero were split; one third was divided among the employees who ran the places and one sixth each went to Capone and three associates. And from these amounts, continued Mattingly, there were legitimate deductible business expenses. One item, the cost of Capone's bodyguards, was deducted from the Syndicate's gross intake

before any division was made. Also, added Mattingly, Capone was entitled to certain deductions on his share—exemptions for his wife, his child, his widowed mother and a younger brother and sister, all of whom he had supported since 1922.

The stenographic record of Capone's own replies to the inquiring government officials was interesting more for what the gangster dodged than for what he told. He was asked whether he furnished the money to buy the home at Palm Island. "I'd rather let my lawyer answer," said Capone. Mattingly then stated that Capone had supplied $10,000, the title had been taken in Mrs. Capone's name and she had signed a mortgage and mortgage notes for $30,000. "What was the source of that money [the $10,000 cash paid on the house]?" pursued the government examiner. "I'd rather not answer," Capone replied. The examiner tried to find out whether Capone held securities or brokerage accounts or other personal property in his wife's name and whether his wife or any other of his relatives had safe-deposit boxes. He asked whether Capone had any interest in dog tracks. But the same refusals to answer followed all the queries.

One prize understatement in the record drew smiles from the usually poker-faced jurors. When Capone was asked, "How long have you had a big income?" he replied, "I never did have much of an income."

Government investigators had scoured Miami and Miami Beach indefatigably for people who had known Capone through business or social encounters. More than twenty such witnesses appeared under subpoena.

The first of these was Vernon Hawthorne, a former State's Attorney of Dade County. He testified that he first met Capone in the summer of 1928 in the office of Dade County Solicitor Taylor. Capone's lawyer, W. F. Parker of Miami, and representatives of the chief of police and the sheriff were also present. Hawthorne said the county solicitor opened the meeting by asking Capone what he proposed to do in Miami. Capone replied that he was there to rest. Hawthorne himself then asked Capone what his business was. After some

hesitation and consultation with his attorney, Capone answered that he was in the cleaning-and-pressing business. When questioned further he admitted he also had an interest in a dog track in Cicero. Hawthorne then asked bluntly, "As a matter of fact, isn't gambling your chief occupation?" Capone answered "Yes," and in reply to later questions said that his places of business were located in Cicero and Chicago.

Miss Ruth Jaskin, a stenographer in the county solicitor's office, corroborated Hawthorne. Referring to shorthand notes she had made at the meeting, she revealed a number of additional statements made by Capone. He denied, she said, that he had ever used the name "A. Costa" or registered at a hotel under that name. He admitted that Parker Henderson, who was to testify later, had negotiated the purchase of the Palm Island residence for him and that he had given him the cash with which to buy it. He denied he had ever been a bootlegger. He admitted knowing Jake Guzik and said he was a friend and business associate of his. According to this shorthand transcript, Capone told the county solicitor he kept a careful record of his financial transactions but could not remember ever receiving money from Charles Fischetti, another of his Chicago friends, in denominations of $1,000 or $5,000.

Parker Henderson, who gave his residence as Miami and his business as a hotel manager, testified that in the first part of January, 1928, he had been called to a Miami hotel where he met the defendant. Capone, he said, was registered at the hotel under the name of "A. Costa" but was introduced to him as "Al Brown." Capone occupied a suite with two other men who were introduced to the witness as Rocco de Grazio and Nick Serella. A social friendship developed between the witness and Capone, and until the following June they were almost daily companions. Capone evidently had kept no secrets from Henderson, and Henderson, as he sat in the witness chair, appeared entirely willing to reveal to the jury the full extent of Capone's confidences.

On one occasion, said Henderson, he had been in Capone's

hotel room when Capone called Chicago on long-distance telephone and talked with Charlie Fischetti. Capone wanted to inquire about Jake Guzik, who had just undergone a serious surgical operation. Henderson asked Capone who Guzik was and Capone replied, "He's a friend of mine in Chicago—a business associate."

Henderson recalled that in the middle of June, 1928, Capone told him he expected some money to come from Chicago by telegraph and asked him to go with Serella to the Western Union telegraph office to get it. Henderson did as directed, and performed the same service frequently after that time.

Mr. Green, who was examining Henderson, then showed the witness a bundle of Western Union money-transfer orders. All were made payable to either "A. Costa" or "Albert Costa." Henderson said that whenever the orders were cashed either Capone or Serella went to get the money. There were about two dozen such orders dated between January and April 1928. The denominations ranged from $1,000 to $5,000 and the aggregate was $35,000.

Henderson testified that between April and June 1928 Capone turned over to him Western Union money-transfer orders totaling $13,500. This money was spent, at Capone's direction, for improvements on the Palm Island place—$4,000 for a swimming pool $2 000 for a wall around the pool, and other sums for a boat dock, landscape gardening, front gates, fences and interior decorations.

Henderson made this interesting statement about the purchase of the Palm Island property:

The mayor of Miami Beach and I heard that Al Capone was intending to buy property in Florida, and so I got in touch with him [Capone] and took him about the neighborhood. He was very much pleased with the Palm Island place but said he didn't want to buy it himself. So he gave me $10,000 and I purchased it on March 27, 1928, and signed a mortgage for $30,000. I kept the property in my name and, in the meanwhile, put in these improvements with the cash

that Mr. Capone gave me. In July of 1928, Mr. Capone suggested that I transfer the property to his wife. So we drew up papers and I signed a deed transferring the entire property to Mrs. May Capone, wife of Al.

Henderson further testified that he came to Chicago in the summer of 1928 to visit Capone. He said he spent seven days in Capone's suite in the Metropole Hotel and during that time met a number of Capone's friends and relatives. He mentioned particularly Rocco de Grazio, Ralph Capone, Jake Guzik, Jack McGurn and Charlie Fischetti. Henderson added that while he was in Chicago Capone gave him $5,450 for additional improvements and labor on the Palm Island property.

Henderson's testimony was fully corroborated. J. Newton Loomis, a former mayor of Miami Beach, attested to the accuracy of the details on the purchase of the Palm Island place. Miami and Chicago Western Union officials and employees affirmed that in 1928 and the first few months of 1929, $77,550 was wired by either Robert (Bobby) Barton, Charles Fischetti, Ralph Capone or Jake or Sam Guzik from Chicago to A. Costa or Al Costa in Miami.

Further supporting evidence was provided by W. C. Harris, office manager of the Miami Southern Bell Telegraph Company, who took the stand to identify Capone's telephone bills for 1928 and 1929. They were mostly for long-distance calls to Chicago and they amounted to $955.55 for 1928 and $3,141.50 for 1929. Capone's counsel protested earnestly that neither the Western Union money-transfer orders nor the telephone bills proved that the defendant had evaded the payment of his income taxes, and ought not be admitted as evidence. The Court ruled that while the evidence was circumstantial, it "might have a potent value." All of the bills were shown to and carefully examined by the jury.

The accumulation of evidence dragged on day after day. But on the fifth day of the trial there occurred an incident extraordinary enough to dispel monotony and to jolt even

crime-accustomed Chicago. Throughout all the proceedings Capone had been watched vigilantly by his bodyguard. D'Andrea, in turn, had been watched vigilantly by the alert intelligence men of the Revenue Bureau, who had become suspicious of a bulging breast pocket in the bodyguard's flashy sportcoat. On this particular day D'Andrea, as he trailed behind Capone from the courtroom to the elevator, fell into a position which pulled his coat tight. The agents were convinced. They seized him and hurried him to Judge Wilkerson's chambers. There he was searched and relieved of a fully loaded .38-caliber revolver, a supply of loose shells and, oddly enough, an official star of a deputy bailiff of the Chicago Municipal Court.[11] Despite the protests of Capone's attorneys that D'Andrea had a permit to carry a gun and "in his ignorance of the law probably supposed that his permit extended to the Federal building," Judge Wilkerson committed him to the custody of the marshal, without bail, to answer a charge of contempt of court.[12]

This flurry of excitement over the Government next produced a long parade of witnesses to prove Capone's lavish disbursements during 1925, 1926, 1927, 1928 and 1929. Ten of them were from Florida. The admission of this testimony was bitterly resisted by Capone's attorneys, who contended that expenditures, however large, did not necessarily mean income during the years in which the expenditures were made. But the Court held otherwise. It ruled that a huge outlay of cash might be indicative of a corresponding income and was a proper circumstance to be considered by the jury in connection with all the other evidence in the case.

A real-estate dealer testified that in 1927 Capone paid him $2,500, six months' rent in advance for a house in Miami Beach. A Miami building contractor said he worked on

11 D'Andrea sought to explain this by saying that he had once been a deputy bailiff of the municipal court and when he quit that employment had neglected to turn in his star.

12 D'Andrea was held in custody until after the verdict in the Capone case. The Court then heard the testimony of the government agents against him. There was no defense and he was sentenced to six months in the Cook County jail for contempt of court.

Capone's swimming pool and garage for thirteen weeks and received $500 a week, or a total of $6,500, which was paid in cash. Another contractor explained that he built a bathhouse and garage in 1929 and was paid $4,800 in cash by Capone's younger brother, "Mimi."

One builder said he constructed a boathouse for the defendant in 1928 for $1,011. Capone paid all but $125 of it in cash. He said he tried to collect the balance but thought better of it after he had encountered two big men at the Capone residence who "treated him rough."

An ornamental-iron contractor testified that he furnished an iron gate for the Capone estate in 1928 and was paid $490 by a check signed by Jake Guzik. A landscape gardener claimed he did a $2,100 job on the Capone estate in 1928. He too received his pay in checks signed by Jake Guzik.

A Miami interior decorator told of work he did in the Palm Island home in the summer of 1928, for which Capone paid him $1,725 in cash.

A department-store manager testified that one day in 1928 Capone came into his store, bought $800 worth of linens and kitchenware and paid cash for them.

A Miami butcher estimated that Capone's meat bill averaged from $200 to $250 a week and totaled $6,500 for the years 1927, 1928 and 1929. Capone usually paid him in cash but on two occasions paid him by assigned Western Union money orders, one for $500 and one for $2,000.

A Miami baker followed the butcher on the stand and stated that he delivered three or four dollars' worth of bread and cake to the Palm Island residence daily while Capone resided there.

According to the Government's proof, Capone's lavish expenditures were not restricted to Florida. Eighteen witnesses were called to testify to some of his fantastic extravagances in Chicago.

One of the desk clerks and an auditor of the Metropole Hotel claimed that during 1925, 1926 and 1927 Capone maintained, under the registry of "Ross Brown," a five-room suite

there. For six months in 1927 the room charges and incidentals ran up to $4,899. One of the incidentals was a single "party" which cost $1,633. Capone, said the witness, always paid in cash—usually in one-hundred and five-hundred-dollar bills. Sam Avery, the manager of the Metropole Hotel, testified that on the occasion of the Dempsey-Tunney fight Capone "threw a party which lasted two days and two nights." The total cost was $3,000 which Capone paid in cash.

A clerk at the Lexington Hotel testified that in 1928 Capone and some of his associates occupied a suite there. They refused to register and the witness said he "made up names for them." The bills were large and were always paid in cash by "Butsie," who was "one of the boys." The witness never knew him by any other name.

Two salesmen from one of Chicago's most exclusive furniture establishments testified that in November and December of 1927 Capone bought $3,088 worth of Oriental rugs for the Lexington Hotel apartment and his Prairie Avenue house. As usual, Capone paid cash. A salesman for another furniture house testified that in June of 1928 Capone made two purchases, one of $7,289.58 for shipment to Miami and one for $1,250 for delivery to his Prairie Avenue house. The first bill was paid by five checks amounting to $7,000 and by $289.58 in cash. The checks were signed by Jake Guzik. Capone himself paid the second bill in cash.

An automobile dealer in Chicago declared that in 1924 and 1926 he sold Capone specially equipped McFarlands at $12,500 each.

A salesman for B. Weinstein, a jeweler, identified a gold-and-diamond belt buckle which Parker Henderson testified had been given to him by Capone. The salesman said it was one of thirty such buckles which had been purchased by Capone at $275 apiece shortly before Christmas, 1928.

Another jeweler, Abraham Quint, and one of his sales staff testified that in the same Christmas season Capone purchased twenty-eight combination cigarette lighter watches at $13.50 each, and made wholesale purchases of sterling-silver table-

ware, glassware, candlestick holders, rings, bracelets, necklaces, beaded bags, perfume sets and "other knickknacks." Altogether Capone paid this dealer between $6,000 and $7,000 from 1928 to 1931.

Capone was a good customer of Marshall Field & Company and apparently patronized most of the departments of that well-appointed store. Seven witnesses, supported by the company's records, testified to his purchases. One spoke of the "truckloads of furniture" delivered to the Prairie Avenue house. Two from the custom-tailoring department testified that during 1927 and 1928 Capone had ordered twenty-three suits, three topcoats and one overcoat and paid $3,715 in cash for them. A fitter in the tailoring department added a neat touch to this testimony: it was Capone's order that "the right-hand pocket in all overcoats be made larger and stronger."

Another Marshall Field witness from the custom-shirt department testified that in 1927 Capone placed two orders for a total of twenty-nine specially fitted and monogrammed shirts. They ranged in price from $18 to $27 apiece. One bill came to $827, the other to $106. In 1928 six more custom made shirts were added to Capone's wardrobe; the cost was $165.

Capone, it seems, also was partial to Field neckwear and handkerchiefs. His purchases of these items in 1927, according to a salesman from that department, amounted to $101.50.

Capone was embarrassed only once during this protracted line of testimony—when one of Field's salesmen betrayed the gangster's penchant for numerous items of "glove silk" underwear.

Finally all the "witnesses to the big money spending," as one newspaper called them, had been heard. The Government then called a former revenue agent, Edward Waters. Waters had been assigned to the Capone case in the early stages of investigation and had questioned Capone about his sources of income. Quite suprisingly the witness developed a most uncertain memory; it was so long ago and he had had

so many conversations with people about taxes that he could not remember what Capone had said. "My mind," declared Waters, "isn't an attic where you store things."

Unpromising as the prospect appeared, Mr. Fink cross-examined Waters. "Wasn't it the general idea among gamblers at the time that no income tax was due on incomes derived from illegal sources such as gambling?" the lawyer asked.

"I don't remember," said Waters.

"Didn't the defendant Capone tell you that such had been his belief?"

"He may have," Waters responded.

Here the Court intervened. "How does it come," said the judge, "that you say 'he may have' in response to a question of the defendant's attorney when you said flatly that you could remember nothing when you were questioned by the United States District Attorney?"

"I mean he may or he may not," explained Waters.

With that Waters was excused.

The last Government witness was Fred Ries, just returned from South America where he had been kept under wraps since his disclosures to Special Agent Wilson. Mr. Grossman conducted the direct examination of this "star" witness.

Ries identified himself as the former cashier of a number of Cicero gambling houses. During 1927 he had charge of the finances of the Subway, the Smoke Shop, and the Radio, all operated for Capone by Pete Penovich. In February of 1927 Ries began to handle also the receipts of the Ship, another Cicero gambling house. Since 1924 "Jimmy" Mundi had operated the Ship, but, as he told Ries, "Capone and his bunch had horned in and were going to take charge." Shortly after that Ralph Capone told Ries that Penovich would manage the Ship. At that time Ries became cashier at this latest establishment in the Capone chain.

Ries testified that he had never seen the defendant Capone in the Subway, but had frequently seen him at the Smoke Shop, the Radio, and the Ship in the company of Bobby Bar-

ton, Ralph Capone and Jake Guzik. Barton handled some of the profits of the Smoke Shop. Guzik took charge of the profits of the other three places. The witness and Penovich took their orders from him.

Ries was shown a cashier's check drawn on the Pinkert State Bank for $2,500, payable to "J. C. Dunbar."

"Who is J. C. Dunbar?" asked the prosecutor.

"Myself," Ries answered.

The witness testified that the $2,500 check was one of forty-three similar checks—totaling between $150,000 and $160,000—which represented the 1927 profits of the gambling houses. He stated that he always turned them over to either Pete Penovich or Bobby Barton and they, in their turn, delivered the checks to Jake Guzik. Guzik, said Ries, told him in February of 1927 to turn over money to no one—"not even to Al or Pete"—unless Guzik himself sent them down.

The checks were offered in evidence despite the defense's strenuous objection that they proved nothing against Capone. The Court ruled that in view of the previous testimony linking Capone and Guzik "they fitted into the chain of circumstances" and were proper evidence.

On cross-examination Ries testified that while he had frequently seen the defendant at the Ship, the Smoke Shop and the Radio in the company of Ralph Capone and Jake Guzik, he had never seen Capone handle any of the money of the enterprises, had never seen him take any bets or, in fact, do anything to indicate that he was in charge of or financially interested in the places.

The examination of Ries was completed on October 13 shortly after the opening of the afternoon session of court. There were still a number of unheard witnesses under Government subpoena, including Johnny Torrio, imported from Brooklyn, and Louis Da Cava, alleged partner in Capone's safe-deposit box at the Pinkert bank. The Government did not call these witnesses. Instead, United States Attorney Johnson announced that the Government rested. The prose-

cutors evidently were confident that they had proved their case against Capone.

The defense counsel were taken by surprise and acted with some uncertainty. They made a motion for a directed verdict of acquittal on the ground of insufficient evidence, but offered no argument in support of the motion. It was promptly overruled.

Unable to decide whether they should present any evidence in Capone's defense, the attorneys pleaded for a two days' continuance. The Court denied the request but gave them until ten o'clock the following morning either to go ahead with their evidence or to begin the summations to the jury.

When court reconvened on the morning of October 14, Capone's attorneys announced they desired to offer some testimony in his defense.

The first witness called was a Chicago cigar dealer who doubled as a handbook operator. He declared proudly that he was a good friend of the defendant. During 1924 and 1925 Capone had been a customer so highly valued that the witness personally called on Capone whenever the latter wanted to place a bet on a horse. These bets ranged in amount from $1,000 to $5,000. According to the witness, Capone was a chronic loser; in 1924 his total losses were between $8,000 and $10,000, and in 1925 they were between $10,000 and $12,000.

Several other witnesses of the same sort followed—"betting commissioners" and "bookies" operating out of prominent Chicago Loop hotels, well-known restaurants and so-called clubs. The aggregate of their testimony was that the defendant's bad judgment in picking winners had lost him $24,000 in 1924, $47,000 in 1925, $55,000 in 1926 and $90,000 in 1927.

All of these witnesses were sharply cross-examined. While admitting with apparent reluctance that Capone sometimes bought a winning ticket, none of them could remember a specific occasion when he won or the amount of his winnings. In fact, none was able to remember the name of a single horse

that Capone had ever bet on. None required Capone to put up cash when he made his bets. His credit, they all agreed, was excellent. As one of them expressed it: "Al Capone had a very honest reputation."

Peter P. Penovich, Jr., the "Pete" Penovich previously identified as the manager of the Subway and other Cicero gambling places, took the stand. While he undoubtedly could have given the jurors a lot of relevant information concerning the Cicero enterprises, the defense confined his testimony to the disclosure that he had been subpoenaed before the grand jury which indicted Capone and had sat in the witness room every weekday for sixteen months. The implication the defense sought to convey was that had Penovich been called as a Government witness his testimony would have favored Capone.

The next witness in Capone's behalf was a Clarence (Bud) Gentry, who added to the evidence of Capone's gambling losses. Gentry said that he, Capone and a man named Cohen had been partners in 1929 in a bookmaking venture at Hialeah, Florida. Capone had contributed sixty per cent and Cohen the other forty per cent of the $30,000 cash put up to start the enterprise; Gentry had operated the business and contributed his time. The profits for the year, between $13,000 and $14,000 in cash and $8,000 in I O Us from noncash customers, were split equally three ways. Despite the profit, said Gentry, Capone lost $110,000 over the year because of the personal bets he placed through the organization.

After these various witnesses had indicated Capone's net income was much less than the prosecution had implied, the defense brought two governmental officials to the stand. The first, Elmer Irey, was head of the Intelligence Unit of the Revenue Bureau and was in charge of the preparation of evidence against Capone. Irey was asked when the present investigation of the defendant's financial affairs was begun, and he replied, October 18, 1928. The defense also asked the Government to confirm the dates of Capone's sentence in the Holmesburg Prison for carrying concealed weapons. It

was agreed that Capone was in prison from April 1929 to March 17, 1930.

The second government official asked to testify was Assistant United States Attorney Green. Mr. Fink asked Green whether Mattingly, Capone's income-tax specialist, had testified before the grand jury. Mr. Green's associates objected to this question because of the law that all proceedings before a grand jury are privileged. But Green volunteered to reply to the query and admitted Mattingly had so testified. Mr. Fink then demanded that the Government allow defense counsel to examine the transcript of Mattingly's earlier testimony and stated that this transcript would contradict the evidence revealed in his damaging letter to the revenue officials. This time the Government's objection that the testimony was privileged was sustained.

The defense rested. There was no rebuttal. Once again the defense asked for a directed verdict of acquittal and, failing to receive it, asked that the Mattingly letter and some items of evidence linking Capone with Guzik, other gangsters and gambling be stricken out. The motions were overruled without argument and counsel was directed to begin the summations. The time for the arguments was limited by the Court to four hours on a side.

Mr. Grossman opened for the prosecution. The Government, he said, had proved that Capone spent $40,000 in 1927, $50,000 in 1928 and $26,000 in 1929—a total in three years of $166,000. And Capone himself, said Grossman, had shown by his own witnesses that on horse races alone he lost $24,000 in 1924, $47,000 in 1925, $55,000 in 1926 and $90,000 in 1927—an additional total of over $200,000.

"Who is this man and where did he get his money?" Grossman demanded. The witnesses from Florida, he continued, had answered that question. Capone told them he was a gambler from Cicero and Chicago, that he was in the pressing-and-cleaning business and that he had an interest in a dog track. Even the defense's witnesses, Grossman charged, revealed the nature of Capone's business and the extent of his

power. Those who testified to Capone's betting losses were part of his organization. "You saw some of them on the witness stand," said the prosecutor. "They showed you themselves what a control he has over them. He pulls the strings and here they come."

Mr. Grossman was followed by his associate, Assistant United States Attorney Clawson. Mr. Clawson concentrated on the Mattingly letter, which unambiguously stated that for the years 1926, 1927, 1928 and 1929 Capone had an income of at least $266,000. And the letter admitted, said Clawson, that Capone had never filed an income-tax return and never paid a cent of tax on this money.

Clawson ridiculed Capone's contentions, made in Mattingly's letter, that he had no income in 1924 and 1925; that during that time he was just a handy man for Johnny Torrio making $75 a week. "Remember," adjured Clawson, "that in those same years, if you are to believe his witnesses, he was losing five times that much at the racetracks."

Clawson elaborated this point:

> Something queer about this [that Capone had never filed an income-tax return], when he admitted that his income for those years ran into the hundreds of thousands of dollars; that he had bought a magnificent Miami Beach estate in his wife's name and his racetrack dealings ran into the thousands. Money flowed from his pockets in a steady stream. He carried rolls of five-hundred-dollar bills that would choke an ox. In this conference [the Mattingly conference] he avoided all questions as to the sources of his income, said he would rather let his attorney answer. And he said he used no aliases. Witnesses in this trial have proved that he covered up all his steps, all his finances, with half a dozen aliases.

"The defense contentions," concluded Clawson, "remind me of the old saying, 'Water, water everywhere and not a drop to drink.' Here, it is 'Money, money everywhere and not a cent for income tax.' Nobody who looks at the evidence can do anything but say that the defendant is guilty."

After Mr. Clawson had finished, Mr. Fink took up the cud-

gels for the defense. First he lamented that the Government advocates had not analyzed the evidence logically in their summations. Then he launched into a two-hour argument, an argument as dexterous as any lawyer could have made under such an overwhelming weight of adverse evidence and circumstances:

There are two principal questions involved in this case—one in which the defendant alone is interested, another which interests you and me, the present generation and future generations. The first question is whether there is any evidence at all which rises to the dignity of hearsay indicating guilt on the part of the defendant. The second and most important question is whether, if there be no evidence of guilt, a jury can be persuaded and conned by the prosecution to bring in a verdict of guilty merely to appease public clamor.

Mr. Fink reminded the jurors of the "time-honored principle of the law" that Capone, the same as any other American citizen, was to be considered innocent until proved guilty beyond a reasonable doubt. Boldly he challenged the Government with the question uppermost in the public mind:

Is the Government merely prosecuting this defendant for evasion of income tax, or is not this prosecution being used as a means by which to stow Al Capone away? . . . If this defendant's name were not Al Capone, there would be no case. You would be laughing at this so-called evidence.

Every count in the indictment, declared the lawyer, charged Capone with a "willful intent" to evade the payment of the tax and "willful intent" meant an intent with malice. "If I were sick on the day my income tax was due," he argued, "and failed to make a return, that would be no crime. And there are other circumstances in which one may fail to make a return and still not be guilty of an attempt to evade the tax." Mr. Fink then referred to the previously established fact that Capone had been released from the Philadelphia penitentiary on March 17, 1930—two days after his 1929 income-

tax return was due. He reminded the jury that six days after his release Capone was in the government tax office with Mattingly trying to determine a just amount and willing to pay whatever tax he rightfully owed.

Mr. Fink spoke bitterly of the lack of evidence:

> Surely, under this evidence, nobody could find that he had willful intent to evade his tax for 1929. There is no possible verdict on those counts [the ones dealing with the year 1929] save not guilty—unless, of course, you intend to return a verdict on no evidence at all.
>
> Capone is charged with evading taxes in 1924, and it is charged that he had an income in that year of $123,000. Where is the proof of it? Is there a scintilla of evidence that he made a dollar in 1924? Isn't it terrible, I ask you, that the Government should request you to violate your oaths and bring in a verdict on that count?

Mr. Fink followed the same line in dealing with the counts which related to the years 1925, 1926, 1927 and 1928. There was no proof, he declared, of net taxable income in any of those years. He attacked the prosecution's theory that the amount of income could be deduced from the amount of spendings. "We don't know what his losses were. How do you know that the money spent wasn't borrowed?"

The defense pictured Capone as a generous, openhanded "good fellow," a man of charity, a man respected and loved by all with whom he came in contact, "a man whose word bookmakers took for thousands." Then, with all solemnity, the defense inquired whether the jury could believe that such a man would defraud the government.

Mr. Ahern followed Mr. Fink with a more detailed and accurate analysis of the Government's evidence. He dealt specifically with each of the years involved and with each of the twenty-three counts of the indictments. He argued forcefully that the Government's evidence was insufficient to prove any one of the counts:

What has been shown by the evidence introduced by the prosecution? Nothing except that this man was a spendthrift. That we are willing to admit has been proved. It has been shown that he should be taken to the Probate Court and have a conservator appointed for him, but it has not been shown that he had any net income for these years and the burden of proving that is on the Government.

United States Attorney Johnson, a mild-mannered, soft-spoken gentleman, made the closing argument for the Government. His quiet, conversational tone contrasted strikingly with the vigorous and often strident utterances of the defense counsel who had preceded him. Mr. Johnson explained to the jurors that it was peculiarly their province to judge of the credibility of the witnesses from their appearance and the likelihood of the truth of their testimony. The jurors must, he said, use the common sense derived from their own every-day experience in deciding where the truth in the case lay. The prosecutor commented sardonically:

What a picture has been presented in this case. Here is a man who has never been engaged in an honest business and save for the purchase of a house in Florida has never engaged in a reputable business transaction. No income, and yet this defendant spent over $8,000 on diamond belt buckles! Counsel has pictured this defendant as a generous man who wouldn't beat the government, yet with all of his lavish spending he could not pay taxes to the government under whose protection he lived.

During four hours of argument defense counsel here were strangely silent about the $77,550 in money transfers sent to Capone in Florida. Examine them. They came from the Lexington Hotel, and you remember the Lexington Hotel. Most of them were sent by Bobby Barton. You remember him as the man to whom, according to the testimony of the witness Ries, the surplus profits of the Smoke Shop were turned over. Others were sent by Charlie Fischetti. Fischetti was the man who Schumway testified sneaked out with the money when a Cicero gambling house was being raided. Others were sent by Sam Guzik, who is no stranger to the

Federal courts. Did this money represent gifts, inheritances or the proceeds of life insurance? From the pictures shown of Barton and Fischetti you can draw your own conclusions.

The evidence in this case shows that this defendant was worried about not paying his income taxes, and that he finally commissioned Mattingly to try to settle the omission. Through Mattingly Capone admitted an income tax large enough to be taxable for the years 1925, 1926, 1927 and 1928.

Mr. Johnson also replied to Fink's charges that the trial was really an attempt to rid society of a gangster:

They say we prosecute because of the name Alphonse Capone, but can you imagine a Federal case the result of public clamor? Consider the thousands of little men and women who earn only a little more than $1,500 a year and pay their taxes. Is it public clamor to demand taxes due in a time of national financial stress and treasury deficit from a man who buys two-hundred-and-fifty-dollar diamond belt buckles and twenty-seven-dollar shirts?

Mr. Johnson also countered the defense criticism that the Government had not called Mattingly to the witness stand. He declared that the written statement to the Revenue Bureau was in itself ample evidence of Capone's income—evidence so complete, declared the prosecutor, that "the Government will collect taxes on every cent of the money confessed in that letter."

The United States Attorney concluded with a simple but impressive appeal for a guilty verdict:

The district attorney was never more sincere in the five years of holding office here than in this case. Never was there a case in my career where there was a more flagrant violation of the laws of the United States. This is a case which future generations will remember. There is no denying the public interest, but I am not asking you to think of this man as Alphonse Capone. Future generations will not remember this case because of the name Alphonse Capone, but because

it will establish whether or not a man can go so far beyond the law as to be able to escape the law.

The delivery of Judge Wilkerson's instructions occupied more than an hour. In a clear voice devoid of suggestive emphasis he reminded the jury that the indictment was not evidence but merely a charge made against the defendant. In itself, it proved nothing. The defendant was presumed to be innocent and the Government was required to establish his guilt beyond a reasonable doubt. The charge could be rightfully proved by circumstantial evidence, but such evidence should exclude any possible hypothesis of innocence.

Then in plain terms he explained the exact charge made in each of the twenty-three counts of the two indictments. While each of these counts, said the judge, alleged a specific amount of tax owed by the defendant, it was not necessary for the Government to prove the exact amount charged; all that was required was that the Government prove beyond a reasonable doubt that in any of the years named the defendant had an income large enough to be taxed.

The Court referred directly to the admissions in the Mattingly letter and affirmed that any statements concerning a crime made freely by a defendant or his authorized agent were admissible in evidence. The jury had to find that the admissions in question were freely made by a duly authorized agent of the defendant. If it found that Mattingly was not Capone's agent or was acting beyond the scope of his authority in making the admissions, it should disregard the letter. If, on the other hand, it found that Capone had employed Mattingly to gather facts concerning his income and to present them to the Federal officials, it had a right to consider the Mattingly statement in connection with all of the other evidence in the case.

"You may," said the Court, "consider all the facts and circumstances, together with the evidence relating to the defendant's mode of living and evidence with regard to money transfers and expenditures. Expenditure of money alone is

not enough to establish net taxable income, nor is possession of money. They may be considered, however, as part of a chain of circumstances in determining whether the defendant had an income."

In concluding the judge told the jurors it was not necessary for a defendant to testify in his own behalf. That Capone did not testify should not be considered by the jury in weighing the evidence and deciding the issue. The evidence, he said, was to be considered in its entirety—every alleged fact in relation to the other facts and circumstances in evidence. And the determination of all facts, including the ultimate one of guilt or innocence, was exclusively their province.

Neither the Government nor the defense complained, either at the conclusion of the Court's instructions or in later proceedings, that the charge as a whole was unfair or that it was in any particular respect erroneous—an unusual tribute which bespoke Judge Wilkerson's ability.

It was in the early afternoon of Saturday October 17 that the Capone case was given to the jurors. After eight hours' deliberation they returned into court with a verdict which found the defendant not guilty on the indictment which charged evasion of 1924 taxes, and guilty on five but not guilty on seventeen of the counts in the second indictment. Translated into plainer terms this meant Capone was found guilty of a misdemeanor—willful failure to file an income-tax return for the years 1928 and 1929—and of a felony—willful attempt to evade payment of income taxes due on his income for the years 1925, 1926 and 1927.

Capone's lawyers moved that judgment on the verdict of guilty should be arrested on the ground that the second indictment was insufficient as a charge of crime and that numerous prejudicial errors had occurred during the trial. On October 24 their motion was argued and overruled, and the Court pronounced sentence: five years' imprisonment in a Federal penitentiary and a fine of $10,000 and costs on each of the three felony counts; one year's imprisonment in the county jail and a fine of $10,000 and costs on each of the two

misdemeanor counts. The sentences on two of the felony counts were to run concurrently, but the sentence on the third felony count was to be consecutive and cumulative to the first two. The jail sentences on the misdemeanor counts were to run concurrently, and be served after the penitentiary sentence had been satisfied.

All these sentences were in addition to the six months' jail sentence imposed on Capone the previous April for contempt of court, but it was ordered that service of the penitentiary sentence on the felony counts would satisfy the contempt sentence. Altogether Capone, in satisfaction of his numerous convictions, would first serve ten years in a Federal penitentiary, then serve an additional year in the county jail and pay aggregated fines of $50,000 and costs.

The motion of the defense that Capone be admitted to bail pending appeal was denied. The same motion was made in the Court of Appeals and it too was refused. The once glamorous gambler took up a temporary residence in the Cook County jail.

The public's reaction to Capone's conviction was one of satisfaction not unmixed with a sense of frustration—satisfaction that he "had been caught up with and put away"; frustration that with all of the heinous crimes imputed to him he was prosecuted and convicted for having failed to pay income taxes to the government on his ill-gotten gains.

## AFTERMATH

None of the defense's efforts to alter the verdict was effective. The appeal proceeded with unusual dispatch. Ably written briefs were filed by both sides and oral arguments heard in the Court of Appeals within three months. The contentions of Capone's attorneys were limited to two points: (1) that the five counts of the indictment upon which the defendant had been found guilty were vague and uncertain and insufficient to charge him with a violation of the revenue laws, and (2) that the admission in evidence of the Mattingly

letter and the verbal statements of Capone and Mattingly to the Treasury Department officials constituted grievous and prejudicial error. On February 27, 1932, the Court of Appeals handed down its unanimous opinion rejecting both of the defense contentions and denying the appeal.[13] A petition to the Court of Appeals for a rehearing was overruled. On May 2 the Supreme Court of the United States denied an application to review the case.[14]

The defense had exhausted the legal processes. Capone was promptly removed from the Cook County jail to the Federal penitentiary at Atlanta. After two years in Atlanta he was transferred to Alcatraz—the "Rock" in San Francisco Bay. There he remained until January of 1939, when he was removed to Terminal Prison off the coast of San Pedro to serve out his jail sentence.

As soon as Capone entered Terminal Prison he was hospitalized. He was an extremely sick man. Shortly after his incarceration at Alcatraz he had developed unmistakable symptoms of paresis and thereafter had suffered progressive deterioration of mind and body—the wages of untreated syphilis.

In November of 1939 relatives and friends (so it was said) paid the $57,692.29 in fines and costs assessed against Capone. The ailing gangster was then released from prison. He had served seven years and six months.

News of his release stimulated rumors that Capone would resume the management of his underworld empire. Jake Guzik, the former business associate of Capone, scotched the rumor: "Bunk," said Greasy Thumb. "Al's nuttier than a fruitcake."

And he was right. A harmless Capone retired to his Palm Island estate and the seclusion he now could find there. No more revels. Just the humdrum routine of doctors' visits, injections and medicines, with such innocent diversions as bat-

[13] 56 F. (2d) 927.
[14] 286 U. S. 553.

ting a tennis ball against a brick wall or playing gin rummy with his ministering relatives.

As time passed he grew progressively worse, and on January 25, 1947, he succumbed to an apoplectic stroke, complicated with pneumonia. He was forty-eight years old. Unlike Colosimo, O'Banion, Weiss, Lombardo, the Gennas, Scalise, Anselmi and scores of his other friends and foes, he died as he had wished—in bed with his boots off.

Incredibly lavish displays had marked the last rites of some of Scarface Al's high-ranking gangster associates. In contrast, Capone's funeral was extremely modest. His body was shipped by rail to Chicago. In a casket that an appraising reporter said "could not have cost a dime over $2,000," covered with "only a sprinkling of gardenias and orchids," the erstwhile emperor of gangdom was lowered into a grave in the family lot in Mount Olivet Cemetery. There were no bands, no crowds, no politicians. Only his closest relatives and a handful of the old gang—among them Jake (Greasy Thumb) Guzik, Anthony (Don't-call-me-Tony) Accardo, Murray (The Camel) Humphreys and "Golf Bag" Sam Hunt—honored his funeral.

These last, with others of Capone's former friends and enemies, had taken over the empire from America's Public Enemy Number One.

# IV

## The Trial of

JULIUS AND ETHEL ROSENBERG

*and*

MORTON SOBELL

for Conspiracy To Transmit Information Relative to the National Defense to Soviet Russia

(1951-1953)

# 4

# The Rosenberg Case

JULIUS AND ETHEL ROSENBERG AND MORTON SOBELL *were found guilty of violating the Federal Espionage Act of 1917. They had, it was charged, betrayed the closely guarded secrets of atomic fission and the atomic bomb to Russia. The victim of this crime was the nation itself. The consequences to the perpetrators of the crime are of record and can be recounted. But the consequences to the victim cannot. Only the unpredictable future will fully reveal the effects of the treacheries of the Rosenbergs, Sobell and the other so-called atomic spies.*

*The penalty which may be imposed upon violators of the Espionage Act is contingent on a state of peace or war. If the crime is committed while the United States is at peace, the maximum punishment provided is twenty years' imprisonment; if the crime is committed while the country is at war, a judgment of conviction may bring a sentence of thirty years' imprisonment or death to the violator. The Rosenbergs and Sobell were found guilty of passing vital military information to Russia from 1944 to 1950. Sobell was sentenced to thirty years' imprisonment and the Rosenbergs were condemned to death. During most of the time the information was transmitted Russia was an ally of the United States; but the United States was at open war with Germany and Japan part of the time, and, in fact, has not yet signed a peace treaty with Germany.*

*The incriminating evidence against the Rosenbergs was overwhelming. Substantially all of it, however, came from confessed accomplices who had become Government wit-*

*nesses in the hope of mitigating the punishment for their admitted crimes. From the time of their arrest the Rosenbergs stoutly denied their guilt. In the face of assurances that their sentences would be commuted if they confessed and informed on other accomplices, they went to the chair protesting their innocence.*

*The defendants were ably represented by counsel of their choice and were tried by a jury summoned and selected pursuant to the established law and practice of the Federal courts. The judgment of conviction which followed a seventeen-day trial was twice reviewed and upheld by the United States Court of Appeals and on eight separate occasions considered by the United States Supreme Court. Two separate petitions for clemency were presented to, considered and denied by the President of the United States.*

*Despite this record, controversy over the justice of the conviction and sentence was violent. The controversy was in part, probably large part, Communist-inspired. Be that as it may, the official termination of the case and the execution of the sentences have not ended the controversy, and the Rosenberg case will no doubt, along with the Sacco-Vanzetti case, the Chicago Anarchists case, the Tom Mooney case, the Eugene V. Debs case and a score of others, evoke never-ending discussion of the justice of particular judicial pronouncements.*

WHILE it may not be literally true that "the history of the world is a history of war," it is an unavoidable and unhappy fact that the course of history has largely been charted by recurrent and violent efforts of some human beings to destroy or subjugate other human beings. Inevitably, then, human history is also partially a history of man's efforts to invent ever more deadly weapons with which to defend themselves or to overpower others. In the appalling and devastating conflict known as World War II man outdid—and perhaps undid—himself in creating an instrument of war-

fare more lethal than any means of destruction previously known.

The first victims of this new weapon were some of America's wartime enemies—the 245,000 Japanese who lived in the island city of Hiroshima. Hiroshima is comprised of six islands separated by the many canals of the Ota River. Like all Japanese cities it is, or was, densely crowded; in August of 1945 three fourths of its population were living compactly within a two-mile radius from the heart of the city. On August 6, at 8:15 in the morning, the heart of the city was mysteriously attacked.

Accounts of what happened varied widely—perception was dulled and memory distorted in the panic of death and in the misery of devastation which followed the initial shock. Sufferers spoke disjointedly of a "gigantic flash," a "blinding yellow light" and a "sudden pressure." They described collapsing houses, crumbling walls, falling telegraph and telephone poles. They told of objects dropping from the sky to kindle fires and ignite explosions, of clouds of dust which accumulated over the city, bringing first a premature twilight and then a deep midnight, and of a gas which hung over all, diffusing a malodorous "electric" smell.

Those who had escaped death looked at streets littered with the dead and dying, listened to the screams of men, women and children caught under the wreckage, watched the injured running wildly to escape the pain from burns oddly patterned by the suspenders or straps that had been seared from their backs. In the canals dead bodies floated face upward. In the streets corpses stood upright in positions frozen by the blast; one group of men had turned their faces heavenward to see the source of their danger and their eyes had burned out of their sockets.

Days later, when the toll of the dead had been finished, it was officially announced that ninety-five per cent of the people within a half mile of the center of the flash had perished. Of the city's entire population, nearly 14,000 persons were missing, more than 37,000 were injured and 78,150 were killed.

Of the city's 90,000 buildings, 62,000 had been demolished.

These immediate effects, horrible as they were, were only the beginning. Apparently uninjured people were suddenly afflicted with "radiation sickness." Tiny skin hemorrhages erupted on their bodies; there were nausea, fever, diarrhea, loss first of the white and then of the red blood corpuscles, anemia, destroyed body cells and weakness. Twenty-five per cent of those afflicted with radiation sickness died.

The stricken people of Hiroshima could only guess at the source of the awful destruction. One guess came very near the truth—"some new and dreadful type of bomb [had been] dropped by the Americans."[1]

On the day after the attack, August 7, the White House announced that Hiroshima had been the target of a bomb that "had more power than 20,000 tons of TNT" and "more than 2,000 times the blast power of the 'British Grand Slam' . . . the largest bomb ever yet used in the history of warfare." Thus the atomic bomb was introduced to the world—in a frightening statement and a decisive demonstration of its power.

After the bomb was dropped on Hiroshima the world began to learn through the radio and press something of this new weapon's history. It was explained that Allied research for the development of such a bomb had begun in 1940. English and American scientists had at that time confirmed a rumor that German scientists had succeeded in splitting the atom and were on the verge of utilizing this new knowledge in a revolutionary weapon which would destroy all England in a matter of days. Immediately President Roosevelt secretly named a committee of eminent American scientists to investigate the possible use of atomic energy for military purposes. At a number of the great universities—Princeton,

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1 The description of the effects of the bomb dropped on Hiroshima and its inhabitants has been taken from contemporary newspaper correspondents' reports and, particularly, from the brilliant eyewitness account of John Hersey in his memorable "Hiroshima," first published in *The New Yorker* and later made available to the public in complete text and permanent form by the publisher, Alfred A. Knopf, Inc., New York, 1946.

Columbia, Chicago and California—laboratories for atomic research were established. On December 5, 1941, only one day before the Japanese attacked Pearl Harbor, Manhattan Engineering District was opened. Unlimited funds were placed at its disposal, and American, British and Canadian scientists co-operated closely in the struggle to produce the atomic bomb before Germany could develop and use it. Few people knew of the existence of the committees, the laboratories or the Manhattan Engineering District. All facets of atomic research were top secret.

Manufacturing plants, organized as secretly and skillfully as the research projects, sprang up at Oak Ridge, Tennessee, at Hanford, Washington, and at Los Alamos, New Mexico. Most of the employees of these plants did not know what they were working on.

After four years a test bomb had been assembled at Los Alamos, and on July 16, 1945, it was exploded at Alamogordo, New Mexico. The high, sturdy iron tower from which the bomb was detonated was wholly disintegrated in the blast and the area around the tower was devastated. It had been proved that a destructive agent powerful enough to end the war against Japan had been developed.

The weapon was put to use immediately. Hiroshima and Nagasaki were bombed and the Japanese surrendered—all within thirty days.

Although Soviet Russia was an ally of the United States, Britain and Canada during the war, her scientists were not invited to work on the atomic bomb nor were they informed of the Allies' attempts to develop it. After peace with Japan was achieved diplomatic relations between Soviet Russia and the United States deteriorated rapidly and steadily. In a matter of months an erstwhile ally became as sinister a menace to the American way of life as Nazi Germany had been. The growing estrangement between the Soviet Union and the other Allies induced the United States, Britain and Canada to make elaborate efforts to keep secret all information concerning the manufacture of the bomb. One of America's foremost

atomic scientists accurately expressed the common fear: "The next most dreadful thing to one powerful nation possessing the secret of the atomic bomb was for two nations to possess it."

Russia wanted to know how to produce the atomic bomb. She lured or shanghaied some German scientists behind the Iron Curtain and conducted her own atomic research, but she knew that her progress would be much hastened if she could make use of the results of American and British investigations. With no other means of obtaining this information available, she resorted to employing spies and to corrupting, by communist propaganda or by whatever means were necessary, susceptible persons in England, Canada and the United States who could provide the facts on the atomic bomb. The men delegated to ferret out the West's atomic secrets were supervised by a member of the powerful Soviet Politburo—one Georgi M. Malenkov.

Malenkov's agents were efficient and successful, but their activities did not altogether escape detection. And the arrest of one transmitter of secret information led to the exposure of many more and finally to the arrest and conviction of the Rosenbergs.

The report of the first arrest of a Russian agent came from Canadian authorities in September 1945. Dr. Alan Nunn May, a British-born, Cambridge-graduated nuclear physicist, had been apprehended in England and charged with sending atomic-energy secrets and specimens of fissionable material—U 233 and U 235 isotopes—to the Soviet Embassy in Canada. May's treachery had been disclosed by one Igor Gouzenko, an obscure Russian clerk formerly employed in the Soviet Embassy at Ottawa.

May possessed many vital secrets of atomic research. He was fully accredited by the British Government and had free access to the various atomic establishments of the United States. He had once worked in the States with other scientists from Britain and America on the Manhattan Engineering District project.

Lesser known facts of May's career were that he had visited

Russia in 1936 and that he belonged to a London organization of scientists whose membership included several Communists.

May confessed to supplying confidential military information to Russia and at his trial pleaded guilty to violating the British Official Secrets Act. He was sentenced to ten years in prison.[2]

The arrest and conviction of one espionage agent did not tell the British and American people what they most wanted to know: how many of our secrets did the Russians possess; how far advanced was their experimentation with the atomic bomb? Four years later an answer was indicated. On September 23, 1949, President Truman announced that the United States Government had evidence that "within recent weeks" an atomic explosion had been set off in Russia.

While the world waited fearfully to learn of the results of May's crime, the Federal Bureau of Investigation was making every effort to track down informers not yet detected. The public first learned of the FBI's successful endeavors on February 2, 1950. News was cabled from London that Dr. Klaus Emil Julius Fuchs, one of England's most trusted nuclear physicists, had been arrested on the basis of information supplied by the FBI. Fuchs was charged with transmitting reports on the atomic bomb and on the experimental hydrogen bomb to Russia.

Washington was profoundly alarmed by the news. The Cabinet convened at once to discuss the matter behind closed doors. The Joint Congressional Committee on Atomic Energy began an inquiry into what it called "a serious break in the security of the United States." General Leslie R. Groves, who had been first in command at the Manhattan Engineering District, was called in to evaluate the significance of Fuchs's espionage. Groves said that he had known Fuchs as Britain's representative to many secret conferences. Fuchs had, he added, "full access" to all information on the production of

2 May was released December 29, 1952, after serving six years and eight months. He showed no contrition for what he had done and declared he thought he had "acted rightly."

the atomic bomb and on the experiments with a hydrogen bomb. Groves solemnly stated that if Fuchs had passed along all the information he possessed, he had advanced Russia's progress toward atomic warfare by years. Groves asserted that blame for the leak lay with Great Britain's inadequate security measures, and he exonerated the United States from any responsibility.

It was perhaps understandable that Fuchs was not suspected of disloyalty, for his personal history was one of escape from tyranny to the freedom of England. Fuchs was born in Germany. His father, a Lutheran minister who later became a Quaker, was known to hold and propound socialistic and pacifist views. When the Hitler regime took control of Germany in 1933 the elder Fuchs was suspected of being anti-Nazi and was interned in a concentration camp. The family was panic-stricken by this arrest. One daughter tried to escape into Czechoslovakia; when she was turned back at the border she committed suicide. A more fortunate daughter eluded the border guards and ultimately reached the United States. A son, Gerhardt, found asylum in Switzerland. And Klaus managed to escape to England.

When Klaus arrived in England he was twenty-one years old. He had completed a high-school course and taken selected work in mathematics and physics at Leipzig and Kiel universities. In England he completed his studies at Bristol University, where he received his degree of Doctor of Philosophy in mathematical physics. In 1939, after two years' additional study, he was awarded the degree of Doctor of Science.

When Britain was threatened with the German invasion in 1940 Fuchs, with a group of other German aliens, was arrested, transported to Canada and interned in a detention camp in Quebec. In 1941 he was released and returned to England, where he applied for citizenship. He became a British citizen in 1942.

As a loyal subject Fuchs seemed irreproachable. People who came in contact with him, either socially or professionally, were impressed with his intelligence, charm and apparent

sincerity. Although he was open about his hatred for the Nazis, he was otherwise quiet, unassuming and ingratiating. Everyone took his loyalty to his adopted country for granted; no one suspected he might be a Communist.

In England's developing atomic research, Fuchs was entrusted with positions of high responsibility. His exceptional enthusiasm, ability and training marked him for preferment and he was one of the carefully selected men assigned to Britain's most important atomic-research center at Harwell, in Berkshire. In 1943 he was appointed to the special British Atomic Commission and was later sent, as a member of this committee, to the United States to co-operate in the development and production of the atomic bomb.

On his initial visit to the States Fuchs remained until 1946. First he was engaged, with other British and American scientists, in research on the important gaseous diffusion process. Then he was sent to Los Alamos and assigned to weapons work. While there he witnessed the explosion of the first test bomb at Alamogordo. Nothing was hidden from him or his English associates. To quote Mr. J. Edgar Hoover, Director of the FBI, "Dr. Fuchs had all of our greatest secrets."

In November of 1947 Fuchs again visited the United States—this time as a member of a British delegation to a conference called to determine how much of the atomic information previously kept secret could be safely declassified. On this visit he was readily accorded permission to inspect the Argonne National Atomic Laboratory at Chicago.

On his second return to England, Fuchs was named one of the senior scientific officers of the Harwell Atomic Energy Research Establishment, which had greatly extended its operations. Fuchs held this most important position at the time he was arrested.

When first accused Fuchs pretended surprise, but he did not long deny his guilt. On February 10 he made a remarkable confession. He characterized himself as a "controlled schizophrenic" who lived two lives - "the free, easy and happy one with other people without fear" and the one "dictated by

his Marxian philosophy" in which he served the purposes of Russia. The story of the second, secret life was one of long Communist affiliation and espionage.

Fuchs had joined the Communist party in Germany in 1932. His excuse for his adherence to Marxian principles was strangely similar to the reason Whittaker Chambers gave the House Un-American Activities Committee for his allegiance to communism; Fuchs said: "I believed Russia would build a new world and I would be a part of it."

Fuchs began his espionage activities as soon as he was assigned to secret work on atomic energy in England. He had volunteered to obtain information that would aid Russia. During the trial he made no attempt to conceal his own initiative or to minimize the importance of the information he had transmitted. He understood what was new and significant and he used his knowledge to see that Russia received the most accurate details.

Fuchs was unable to name any other Russian agents. He said that he had established his original contact through a member of the Communist party known to him. After that initial offer, his confession read, he "had continual contacts with persons completely unknown [to him] except that they would give information to the Russians." Wherever Fuchs was located—in England or in the United States—these contacts were provided for him. He was notified only of places of meeting and of identification signals.

The case of *Rex v. Fuchs* came on for trial in Old Bailey in London on March 1. It was an impressive proceeding carried through with all the formality of a British trial and with the best legal talent England could summon. One of Britain's greatest criminal barristers, Derek Curtis-Bennett, had been assigned to Fuchs's defense. The Attorney General himself, Sir Hartley Shawcross, prosecuted.

The indictment was read. Fuchs stood accused of passing atomic secrets to Russia at four specific times and places in the United States and England between 1943 and 1947. To

this charge Fuchs pleaded guilty in a voice scarcely louder than a whisper. Three witnesses for the prosecution testified—a fellow scientist and two officials of Scotland Yard. Excerpts from Fuchs's confession were read. When the charge and the evidence against Fuchs had been presented, Derek Curtis-Bennett made a direct and dignified plea for leniency. He pointed out that Fuchs had never denied his Communist affiliations and that there was no direct evidence on which to prosecute other than Fuchs's own confession. These circumstances, the defense attorney urged, should mitigate the sentence.

Justice Goddard thought otherwise. The crime, he said, "could be only thinly differentiated from high treason. . . . The defendant was one of the most dangerous men that England could have on its shores; . . . [his act] had done irreparable harm to both the United States and Britain." The Lord Chief Justice concluded, "The maximum sentence for the crime charged is fourteen years. . . . And that is the sentence I pass on you."

The Fuchs case had repercussions. Many United States Congressmen vehemently demanded that exchange of secret atomic information between England and the United States cease. British newspapers advocated a thorough overhaul of the Security Agency to prevent a repetition. Anthony Eden took the floor of the House of Commons to call Fuchs's espionage a "most deplorable and unfortunate incident." Russia issued a formal denial that she had ever heard of Fuchs or ever accepted information from him.

The British authorities were content to imprison Fuchs, but the United States Government believed that Fuchs might provide a clue to other espionage agents. Through proper diplomatic channels the United States requested that representatives of our Department of Justice be allowed to question Fuchs. The request was answered at first only with hesitation; to allow foreign officials to interrogate a prisoner would be a departure from British custom. The American public was en-

raged by this refusal and members of the United States Senate Atomic Energy Committee publicly denounced Britain for refusing to help reveal Russian spies. Finally the "right" of Americans to interview a convicted British prisoner was discussed in the House of Commons and a qualified permission was granted. American representatives might question Fuchs in the presence of designated Scotland Yard officials.

Details obtained from Fuchs led to the arrest on May 23, 1950, in Philadelphia of a man named Harry Gold. Gold was accused of being one of the contacts through whom Fuchs had sent information to Russia on two occasions, once in 1944 and once in 1945. Harry Gold, originally Golodnitsky, had a personal history something like Fuchs's though it was less spectacular. Gold was born of Russian parents in Switzerland. In 1913, when Harry was three years old, the family immigrated to America and settled permanently in Philadelphia. Gold studied at the University of Pennsylvania for two years and after that attended evening courses for two more years at the Drexel Institute of Technology, where he received a diploma in chemical engineering. In 1938 he entered Xavier University in Cincinnati, Ohio, and graduated from that institution with a degree of Bachelor of Science, *summa cum laude*, in 1940. From 1940 to 1946 he worked as a biochemist for a private industry. His professional associates, and also his social acquaintances, found him intelligent, ambitious, quiet and unassuming.

But Gold, unlike Fuchs, had been suspected of some undercover activity long before his arrest. The FBI had picked him up in 1947 when Elizabeth Bentley,[3] a onetime member of the Russian underground, warned Federal agents that Gold was active in Soviet espionage. Gold was questioned at that time, but nothing incriminating could be found against him and he was released.

[3] After breaking with the Communist party, Elizabeth Bentley gave the Federal authorities a mass of valuable information concerning Russian espionage in America. See author's account of the Alger Hiss case in *Guilty or Not Guilty?* (Indianapolis: Bobbs-Merrill, 1952), p. 199.

The FBI investigators did not forget Gold, however, and when Fuchs described one of his contacts as "a short, stocky man about forty, and a biological chemist, apparently of Russian extraction" they included him among the thousand or more suspects who fitted the description.

When Fuchs was shown the pictures of the suspects he was unable to identify any of them as the man who had accepted his reports. The Federal Bureau of Investigation then had the exceedingly difficult job of finding a man of average appearance of whom they had only a vague description. As usual the FBI accomplished an amazingly clever piece of detective work and narrowed the list of suspects until it had the right man. First Federal agents examined and re-examined the activities, locations and occupations, particularly those from 1943 to 1947, of all the suspects. The crucial problem was to discover which of them had been in New Mexico in 1945 when Fuchs was working at Los Alamos. The examiners discovered that Gold had visited Santa Fe in June 1945, and when Gold denied that he had ever been west of the Mississippi River, the agents gave him special treatment. They took motion pictures of him in literally dozens of different positions and movements—there were front views, back views, profiles; close-ups of his hands and feet; shots of him standing, walking and running. The film was flown to England; when Fuchs was shown this comprehensive portrait of Gold he positively identified him as his American contact.

The mass of carefully collated evidence with which Gold was confronted broke through his pretense of innocence. He made a long confession, the details of which fitted into the Fuchs story like the missing pieces of a jigsaw puzzle. Immediately Gold was placed under $100,000 bail; no surety came forward. When arraigned in the Federal court in Philadelphia he told District Judge James P. McGranery that he would not resist extradition and was prepared to plead guilty. Gold's only request was that he be assigned "a patriotic counsel . . . who would not make a show." The Court appointed Mr. John D. M. Hamilton, a highly regarded lawyer, well

known as former chairman of the National Committee of the Republican party, as defense counsel. Mr. Hamilton promptly accepted the undesirable appointment, as he was ethically bound to do. Counsel and the Court agreed that Gold should be kept in custody in Philadelphia pending further action.

On June 6 Gold was formally indicted by a Federal grand jury at Brooklyn and charged with having delivered military secrets to Soviet agents from December 1943 to November 1947. Specifically he was accused of relaying documents, drawings, sketches and notes on nuclear energy to underground Soviet agents in Brooklyn, Long Island, Boston, Cambridge and Santa Fe. Two other men who were known to have associated with Gold but who were still unidentified were charged with the same crime. Because their names were then unknown or undisclosed, the indictment referred to them as John Doe, alias "John," and Richard Roe, alias "Sam."

Gold knew he was trapped. His sole idea now was to get out of his difficulties with as light a sentence as possible. He correctly apprehended, or was advised, that his best course was to tell the FBI the whole truth, regardless of the danger of implicating other people. And he did just that; he revealed that he had been continuously engaged in espionage for the Russian Government from the spring of 1935 until the time of his arrest. This long history of underground activity pointed toward many Soviet agents, and several were apprehended on the basis of Gold's disclosures.

Two Russian citizens were named by Gold as accomplices. One was Anatoli Antonovich Yakovlev, a former Russian vice-consul at New York; the other was Semen M. Semenov, an employee of a Russian trading and purchasing agency with American contacts, the Amtorg Trading Company. These, as the events proved, were the "indefinites," John Doe and Richard Roe, named in the indictment with Gold.

In describing his transactions with Soviet agents Gold mentioned a third man, Alfred Dean Slack. Slack, said Gold, was a chemical engineer with a university degree, working at

present for a paint manufacturing company in Syracuse, New York. During 1943 and 1944 he had held various positions with the government and with companies producing war materials for the government. While employed at the Holston Ordnance Works at Kingsport, Tennessee, Slack had smuggled classified information and samples of a new and powerful explosive called RDX to Gold.[4] Gold in turn passed the secrets to Semenov.

Slack was arrested in Syracuse on June 14, 1950, and removed to Knoxville. There he pleaded guilty to obtaining vital restricted information and materials for Russia. Like so many of the espionage agents brought to trial, Slack was well regarded by his employers and neighbors, many of whom were active in his behalf. They urged the Government to show leniency because the defendant was married and had three children. The district attorney also urged leniency and recommended a ten-year prison term as adequate punishment. But the Court, calling this a "shocking" crime, sentenced Slack to fifteen years' imprisonment in the Federal penitentiary at Atlanta.[5]

Gold brought two other underground workers to the law's attention when he told why he had answered falsely to the charges made against him by Miss Bentley in 1947. He explained that an electrical engineer named Abraham Brothman and his business associate, Miriam Moskovitz, had coerced him by arguments, promises and threats to give before a Federal grand jury false testimony which would support statements they had once given the FBI. Brothman, who Gold said was a paid Russian agent, had passed large quantities of "specifications, formulas, and blue prints" concerning American-manufactured explosives, synthetic rubber, aviation gasoline and other materials to Semenov and Yakovlev.

[4] This explosive did not enter into the manufacture or detonation of the atomic bomb.

[5] Slack later instituted proceedings for a review of his case and modification of his sentence. He obtained a rehearing (196 F. (2d) 193) but the district court adhered to the original sentence.

When the FBI had inquired into these transactions Brothman had convinced the Federal agents that all his dealings with Russian agents had been for the legitimate purpose of getting orders in his business. He assured the Federal agents that he handled only well-known and publicly available goods. Gold had perjured himself by giving testimony under oath which corroborated the false statements of Brothman.

Brothman and his accomplice were jointly indicted by a Federal grand jury in July 1950; both were charged with conspiracy to obstruct justice, and Brothman was further charged with endeavoring, in 1947, to persuade a witness to give false testimony. In November the case was heard in New York City by District Judge Irving R. Kaufman and a jury. Gold testified as a Government witness, and neither defendant took the stand to refute him. Both were found guilty on the charge of conspiracy to obstruct justice and sentenced to two years in jail and to a fine of $10,000. Brothman was also found guilty of subornation of perjury, and sentenced to an additional five years' imprisonment and $5,000 fine.[6]

By far the most important clue supplied by Gold came as the result of his revealed collaboration with Fuchs. He told in detail of his meetings with Fuchs in New York City, Brooklyn, Cambridge, Massachusetts, and Santa Fe, New Mexico. Then he revealed that he had been sent on a secret mission to New Mexico by Yakovlev. This time it was to Albuquerque where Gold was to find a certain house on High Sreet and to inquire for a man named Greenglass. To identify himself Gold was to say, "I come from Julius" and to match an oddly shaped piece of cardboard, given Gold by Yakovlev, with a piece of the same cardboard in Greenglass' possession. If the identification proceeded correctly, Gold was to give Greenglass an envelope containing $500 and was to receive from Greenglass a sealed envelope to be guarded carefully

[6] The conspiracy sentences were affirmed on appeal to the United States Court of Appeals. Brothman's conviction on the subornation of perjury charge was reversed (191 F. (2d) 70).

and finally turned over to Yakovlev. The mission, Gold said, was consummated successfully.[7]

The FBI lost no time in tracing Greenglass. He was promptly arrested in New York City and with him his wife Ruth, his sister Ethel Rosenberg, his brother-in-law Julius Rosenberg and a man named Morton Sobell.

Greenglass—his full name was David Greenglass—was, at the time of his arrest, a twenty-eight year-old married man with two children. Most of his life was spent on New York's Lower East Side, where his parents, immigrants from Russia and Austria, settled when they came to America. The children, who were born in this country, grew up on the streets of that crowded, lively quarter. David went to public high school and later attended classes at City College of New York and also at Polytechnic and Pratt institutes in Brooklyn. In 1936 he joined the Young Communist League.

In April of 1943 David was inducted into the United States Army. By late 1944 he had attained the rank of technical sergeant and was stationed at Los Alamos as a machinist. His particular job at the New Mexico atomic plant put him in contact with sources of authentic information on the bomb. He studied plans, sketches and directions for machining certain units of the bomb; he also had intimate contact with the resident scientists in charge of the Los Alamos project. Greenglass had a good work and security record and was kept on this responsible job until February 1946, when he was honorably discharged from the Army.

He returned to the Lower East Side to resume civilian life, and formed a partnership with his brother-in-law Julius Rosenberg to operate some machine shops in that district.

On July 7 Greenglass was indicted by a Federal grand jury at Santa Fe, New Mexico, charged with having furnished Gold with secret information concerning the atomic bomb.

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[7] By agreement among the Attorney General, the New York District Attorney and counsel for Gold, Gold's case was retained at Philadelphia for disposition by District Judge James P. McGranery. On December 7, 1950, Gold was sentenced, on the basis of his previous plea of guilty, to thirty years' imprisonment.

Greenglass and his wife Ruth, who had been a partner in his espionage activities, followed the examples set by May, Fuchs and Gold. They agreed to plead guilty, and their disclosures not only confirmed Gold's story about the transaction in Albuquerque, but also implicated Julius and Ethel Rosenberg as central figures in an atomic spy ring of terrifying proportions.

The story Greenglass told began late in 1944 about the time that he was transferred to Los Alamos. This was roughly eight months before the test bomb was completed and exploded. Julius Rosenberg had visited Ruth Greenglass to tell her that her husband had been assigned to work on a new secret weapon, the atomic bomb, and he proposed that Mrs. Greenglass go to New Mexico and urge David to smuggle out information on the Los Alamos layout and on the bomb. Mrs. Greenglass accepted her brother-in-law's offer to pay the expenses of the trip, and told her husband of the terms on which her visit had been made possible.

Greenglass confessed that he consented to work with Rosenberg and supplied him with oral and written reports on the work at Los Alamos on several occasions. One of the things he conveyed was knowledge of the projected detonation of the test bomb at Alamogordo.

Passing of information stopped, of course, when Greenglass was released from the Army and from his work at Los Alamos, but meetings dealing with underground plots did not. In May, three months after Fuchs's arrest in February, Rosenberg told Greenglass that Gold had been one of Fuchs's contacts and was soon to be arrested. He said that Gold might talk and that Greenglass and his family should get out of the United States quickly. Rosenberg arranged the details of the escape and provided $5,000 for expenses. But Greenglass decided not to leave the country.

As he traced the workings of the espionage unit he had engaged in, Greenglass implied that Julius Rosenberg was the organizer of other similar units. Greenglass could name only one suspect definitely. This was Morton Sobell, an electronics engineer who had worked at General Electric Cor-

poration and other American corporations producing war materials. Greenglass thought that Sobell, who had access to highly significant data, supplied Rosenberg in much the same way that he himself had. It was Greenglass' impression that Julius turned over all the information to Russian agents.

Ruth Greenglass corroborated her husband's confession. She did not know quite so much about the machinery of the spy ring as her husband, but what she did know agreed with his statements.

The FBI closed in on the known members of this spy ring with dispatch. On July 17 Julius Rosenberg was arrested in New York City. On August 20 his wife also was taken into custody. Both were held under $100,000 bonds. Only seven days later Sobell was extradited from Mexico where he was attempting to follow the "espionage route" beyond the reach of the FBI. A New York grand jury indicted the two Rosenbergs, Sobell, David Greenglass and Anatoli Yakovlev on the same day, which was August 17. Neither Ruth Greenglass nor Harry Gold was made a defendant, but both were cited as persons with whom the named defendants had conspired.

These five people were charged with a most serious crime against the citizens of the United States; the essence of the charge was that they had conspired among themselves and with others to obtain information relative to the national defense and to place this information in the hands of a foreign government.[8] The alleged crime was a violation of the Espionage Act of 1917.[9]

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[8] This indictment of August 17, 1950, was superseded by an indictment returned January 31, 1951, which specified in greater detail the overt acts with which the defendants were charged.

[9] This act (50 U.S.C. 32; U.S.C.A., Title 18, 794) reads as follows: "(a) Whoever with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance or information relating to the national defense, shall be imprisoned not more than twenty years. (b) Whoever violates subsection (a) in time of war shall be punished by death or by imprisonment for not more than thirty years."

The people accused of the crime were, with the exception of Yakovlev, Americans from a background similar to Greenglass'. Julius Rosenberg was a first-generation American of Russian parents who had migrated to New York City. From the public grade and high schools Julius progressed to New York City College, where he studied electrical engineering; in 1939 he graduated from that institution with a degree of Bachelor of Science. A year later he took a Federal civil service examination for civilian employment in New York with the United States Signal Corps. In 1945, when he was charged with being a member of the Communist party, he was discharged from Federal service. It was about this time that his brother-in-law returned from his stint in the Army, and Julius and David opened machine shops together. Julius was still managing these shops when he was arrested.

His wife, Ethel Rosenberg, also was born in New York City. After graduating from high school she studied stenography and typing, music, dancing and child psychology in various schools around the city. She married Julius Rosenberg in 1939 and after her marriage she worked for a short time as a clerk in the United States Census Bureau. At the time of their arrest the Rosenbergs had two children, Michael, aged seven, and Robert, aged three.

Sobell had known the Rosenbergs and Greenglass since his college days; he too attended City College and studied electrical engineering. During the war years he worked on electronic research at the Schenectady plant of the General Electric Corporation and, as a civilian engaged in essential war work, obtained deferment from active service in the armed forces. Sometime after the war Sobell left General Electric to take a job with a private engineering company in Flushing. It was this position that he hastily vacated when he fled to Mexico.

Yakovlev, while not a native New Yorker (he was born in Russia in 1911), had lived in that city for several years. In 1941 he obtained a visa from the American Embassy in Moscow and came to the United States ostensibly as a clerk on

the staff of the Soviet consul general at New York. Later events proved the Yakovlev's duties were not merely clerical. In fact, he had not been here long when he was named vice-consul. He returned to Russia in December 1946 and was not present at any of the court proceedings against him.

The trial of the case of *United States v. Julius and Ethel Rosenberg and Morton Sobell* began on March 5, 1951; it was held in the Federal Court House on Foley Square in New York City. Men of distinguished legal careers participated in the case. Honorable Irving R. Kaufman, one of the district judges for the Southern District of New York, presided. Although he was still a young man, forty years old, he had taken part in many notable criminal cases. Altogether he had spent eighteen years at the bar, six of them as an Assistant United States Attorney for the New York District and a little more than one year as a district judge. His service on the bench, though brief, had been noteworthy: already he had established a reputation for ability and strict impartiality.

Appearing for the government were United States Attorney Irving H. Saypol, his principal assistant, Myles J. Lane,[10] and assistant United States attorneys Roy M. Cohn and James B. Kilsheimer III. All took active parts in the trial.

The defendants chose for their counsel able and experienced attorneys. Emanuel H. Bloch, a well-known criminal lawyer, appeared for Julius Rosenberg; his father, Alexander Bloch, appeared nominally for Ethel Rosenberg, but the son shouldered the burden of defense for both husband and wife Sobell was represented by Edward H. Kuntz and Harold M. Phillips.

Although Greenglass was not on trial[11] he too was represented by counsel. O. John Rogge former ace trial lawyer in the Attorney General's office, advised him. Greenglass had

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10 Later appointed United States Attorney for the Southern District of New York.

11 For the purposes of the trial a severance was ordered as to Greenglass and Yakovlev.

already pleaded guilty and was waiting sentence. It was Rogge's job to keep his client in the good graces of the government and get him off with as light a sentence as possible.

To expedite the selection of a jury the trial judge, using memoranda submitted by counsel, did all the questioning. Even with the interrogation and qualifying pared to a minimum it took an hour and a half to find among the three hundred persons called up for jury duty twelve jurors and four alternates that could qualify as the "good men and true" who should decide the fate of the accused spies. Eleven men and one woman were finally sworn in, and one woman and three men stood by as alternates.

The trial itself opened with a formal reading of the indictment. As chief prosecuting attorney, Mr. Saypol, speaking in calm but deadly earnest tones, outlined the Government's case and stressed the danger to which the United States had been subjected by the criminal acts of the defendants:

The significance of a conspiracy to commit espionage takes on an added meaning here where the defendants are charged with having participated in a conspiracy against our country at the most critical hour of its history, in a time of war.

Next Mr. Saypol clarified the terms of the indictment for the jurors:

The charge of the Grand Jury is contained in a one-count indictment which his Honor has read to you. The Grand Jury charges that the defendants, Ethel and Julius Rosenberg and Morton Sobell, from 1944 until the time when they were indicted by the Grand Jury, some months ago, conspired and agreed with each other and with other conspirators, including Harry Gold, David Greenglass, David's wife, Ruth Greenglass, and one Anatoli Yakovlev, an agent of the Soviet Union. The Grand Jury has charged that the object and purpose of this conspiracy by these people was their plan to deliver information, documents, sketches and material vital to the national defense of our country to a foreign power, namely, Soviet Russia.

The prosecuting attorney promised that the Government's evidence and the conspirators themselves, as they testified, would unfold the details of the plot against the nation's security:

The evidence will show that the loyalty and allegiance of the Rosenbergs and Sobell was not to our country but to communism—communism in this country and throughout the world under the dictatorship of the Soviet Union. . . . The evidence will reveal to you how the Rosenbergs persuaded David Greenglass . . . to plot the treacherous role of a modern Benedict Arnold while wearing the uniform of the United States Army. . . . We will prove that the Rosenbergs devised and put into operation with the aid of Soviet nationals and Soviet agents in this country an elaborate scheme which enabled them, through Greenglass, to steal the one weapon which might well hold the key to the survival of this nation and the peace of the world—the atomic bomb.

In a dramatic recital Mr Saypol credited the FBI with breaking the conspiracy; he traced the spy hunt from the apprehension of Fuchs, through the arrest of Gold, to the crucial investigation of Greenglass. The climax was a resumé of Greenglass' revelation of the treacheries perpetrated by Julius and Ethel Rosenberg and Morton Sobell, now to be tried for their crimes.

In closing the prosecutor said:

The evidence of the treasonable acts of these three defendants is overwhelming. The evidence will prove to you not beyond reasonable doubt, but beyond all doubt, that all three of these defendants have committed the most serious crime that can be committed against the people of this country.

The defense lawyers limited their introductory remarks to brief statements designed mostly to clarify the jury's responsibilities; they repeated that the defendants had pleaded not guilty and they must be considered innocent unless the Government could prove its charge beyond a reasonable doubt. Finally, they stressed the solemn obligation of the jurors to

refrain from forming an opinion until all evidence, the summations of counsel and the instructions of the Court had been presented.

Altogether nineteen witnesses took the stand to support the Government's case in chief against the defendants. A number of these testified only briefly to corroborate statements made by more important witnesses. Others swore that the Rosenbergs and Sobell were devoted Communists, imbued with the communistic ideal of subjugating the entire world to Soviet domination.

The principal witness against Sobell was one Max Elitcher; he was the first of the star witnesses to be called to the stand. Elitcher had long been an acquaintance of the Rosenbergs, with whom he had gone to college. He was an even closer friend of Sobell, having attended high school with him and roomed with him in Washington.

Elitcher, an electronics engineer, was employed with the United States Navy Bureau of Ordnance from November 1938 to October 1948, and his work was of highly important and secret nature. During most of the time he was working for the Navy, Elitcher was a Communist. At Sobell's solicitation he had become a member of a "cell," and he regularly attended its meetings until he left the party in 1948. Elitcher stated that Sobell had frequently presided at the cell meetings.

Through Sobell Elitcher met the Rosenbergs and learned that they were active party members and secret Soviet agents. Both Sobell and Julius Rosenberg approached Elitcher about espionage work. Sobell merely asked whether he knew of any "engineering graduates who were progressive" that could safely be asked to obtain secret information for the Soviet Union. Not long after Sobell made his inquiries Rosenberg invited Elitcher to participate in the transmission of information. Rosenberg pointed out that Elitcher's job placed him in a very advantageous position for securing information on United States armed services and offered to photograph and return promptly any data which Elitcher could smuggle from the files. Several times in 1944, said Elitcher, Rosenberg asked

Elitcher to obtain specific items of information and he, Elitcher, pretended to do so. The witness asserted, however, that he had never given Rosenberg any information classified as secret.

Once, added Elitcher, when he had considered resigning from the Navy Department to accept a position in private industry, Sobell and Rosenberg urged him to retain his government job because it was a valuable source of secret information.

Further evidence of the underground activities of the defendants was provided when Elitcher admitted he had regularly acted as a courier between Sobell and Rosenberg. On one of his visits to Rosenberg, Elitcher recalled, he heard Rosenberg say that he had had telephone conversations with a Russian agent named Elizabeth Bentley. Another time, Elitcher said, he thought he was being trailed by FBI agents, but he nonetheless made a "midnight emergency" visit to Rosenberg with Sobell. The cargo of the visit was a 35-millimeter can which contained "valuable information."

A vigorous cross examination of Elitcher did not discredit his testimony. Under the defense attorney's attack, Elitcher admitted he lied when he took a loyalty oath, but he firmly insisted that "ever since the FBI got hold of [him he] had told the entire truth."

The first direct evidence against Rosenberg and his wife was given by their sister-in-law, Ruth Greenglass.[12] Mrs. Greenglass was a personable young woman of twenty-five who co-operated readily, almost eagerly, with the prosecuting attorneys. In reply to Mr. Kilsheimer's questions she explained that she had married David Greenglass seven years before and thus had come to know Julius and Ethel Rosenberg intimately.

Unequivocally she stated that her husband had been a Communist and that Julius and Ethel Rosenberg were Communists. In their family gatherings she and the Rosenbergs

12 To maintain the chronological sequence of the events revealed by the testimony, the precise order in which the witnesses were called has been disregarded.

had often discussed the relative merits of Russian socialism and American capitalism and had agreed that Russian socialism was the better economic and political system.

It was in 1944, said Mrs. Greenglass, that such general conversation on communism had given way to discussions of concrete ways and means to serve the party. In late October or early November of 1944, while her husband was yet in service, the Rosenbergs had invited her to dinner at their apartment in Knickerbocker Village. After dinner Ethel remarked that Ruth must have noticed that she and Julius no longer participated actively in party affairs, that they did not attend the cell meetings or buy the *Daily Worker* any longer. That was, said Ethel, because Julius had finally reached a point where he could do what he had wanted to do all along—supply secret valuable information to the Soviet Union. At this point, according to Mrs. Greenglass, Julius took over the conversation by saying that David, her husband, could help greatly in this espionage because he was working on an atomic-bomb project at Los Alamos, New Mexico. Until Julius told her, said Mrs. Greenglass, she had not known what David was doing. Julius proposed that she go to Los Alamos and tell her husband to get information about the operations there and to transmit it, via the Rosenbergs, to Russia. He, Julius, would provide money for the trip.

Ruth Greenglass replied that she did not want to ask her husband to do such a thing, but Julius assured her that David would want to help. One of the arguments Julius used to persuade her, Mrs. Greenglass said, was that Russia was an ally of the United States and as such deserved information on the atomic bomb. Russia was not, said Julius, getting the information "which was coming to her." Finally, because her second wedding anniversary was approaching and because she wanted to spend it with her husband, Ruth Greenglass agreed to make the trip. When he gave her the $150 promised her for expenses, Julius said it "came from his friends, the Russians." Before she left, Julius made her memorize de-

tailed instructions concerning the information she should ask her husband for.

The witness then reported the success of her journey. When she met her husband she related all the details of her conversation with Ethel and Julius. At first David was reluctant to co-operate, but the next morning he agreed to give her the information Julius wanted—"the general layout of the Los Alamos project." David reported to his wife the arrangement of the buildings, the number of employees, the security measures, camouflage, experiments being conducted and names of the scientists working there. Then, following Julius' instructions, Ruth memorized it. On her return to New York she repeated it faithfully to Julius.

Mrs. Greenglass described another meeting at which the Rosenbergs plotted the exchange of secret information. In January 1945 her husband obtained a twenty-four-day furlough and spent it with her in New York. A few nights after his arrival the Greenglasses met the Rosenbergs by appointment at the latter's apartment. They were introduced to a Mrs. Sidorovich. First they discussed the kind of information David should seek when he returned to Los Alamos and then Julius explained that Mrs. Sidorovich might be sent to New Mexico to get the information from David. Julius produced two torn halves of a Jello box top and said that Ruth, who was going to New Mexico to be with her husband, should keep one part. Whoever was sent to get in touch with the Greenglasses would identify himself by producing the other half, he said. Mrs. Greenglass remembered that when her husband commented on the simplicity and cleverness of the recognition plan, Julius remarked, "The simplest things are always the cleverest."

The contact was made in June 1945. At that time the witness and her husband were living at 209 North High Street in Albuquerque, New Mexico. Early one morning a man called and offered the matching piece of the Jello box top. Mrs. Greenglass identified this agent as Harry Gold. Gold,

she said, gave her husband $500 which her husband gave to her. She put $400 in the bank; with $37.50 she bought a United States War Bond; the balance she used for household expenses.

By May of 1950 David had been discharged from the army and the Greenglasses were again living in New York. Their association with the Rosenbergs was closer than ever, for now David and Julius were business partners. The witness told in detail of a hurried visit Julius made to them on May 24. He excitedly brandished in his hand a copy of the New York *Herald Tribune*. On the front page was Harry Gold's picture and news of his arrest as a Soviet spy. Julius said to David, "You will be next. You will be arrested between the twelfth and eighteenth of June." He insisted that the Greenglasses escape to Mexico at once. Ruth Greenglass demurred—the baby was only ten months old and could not possibly stand the trip. Julius brushed her objection aside, and said they must go. He left $1,000 with them for preliminary expenses and told Ruth to have passport pictures taken and to get a doctor's certificate that she, her husband and the two children had been in[illegible] for smallpox. When she refused to try to procure a false certificate, Julius promised he would get it.

Despite all Julius' warnings and preparations, said Mrs. Greenglass, she and her husband remained in New York. On June 15, 1950, David was arrested. A day or [illegible]rward, the witness attested, Ethel Rosenberg urged h[illegible] 'make David keep quiet" and "as long as Julius had been questioned by the FBI and released to take all the blame on himself."

Alexander Bloch cross-examined Mrs. Greenglass. As a specimen of cross-examination his effort was praiseworthy. To show the witness had been coached and had memorized her story he asked her to repeat her account of the Rosenbergs' first efforts to enlist her and her husband in espionage. In the second telling she followed the same orderly sequence and used practically the same words she had used before. It was made quite apparent to the jurors that Mrs. Greenglass knew she had committed a crime, but hoped that she and her hus-

band would be given consideration for the aid they were giving the government. Mr. Bloch tried to show that fear of the FBI had influenced her testimony. Here the answer he drew was unfortunate. To the question, "Weren't you frightened by the FBI?" she replied, "Everyone is frightened by the FBI, but it was not because I realized it was a crime that I was frightened. I didn't think the FBI wanted my husband. I thought they wanted someone my husband would lead them to, someone much more important than he and much more deeply involved."

David Greenglass corroborated and complemented his wife's testimony. Under the direct examination of Assistant District Attorney Cohn he described his education, his employments, his affiliation with the Young Communist League, his marriage and his relation to Ethel Rosenberg. His account of his introduction into espionage agreed with his wife's: Julius Rosenberg had sent Ruth to persuade him.

Greenglass denied that he had known of the atomic bomb before Rosenberg relayed news of it to him. When he was put to work machining parts at Los Alamos, said David, he knew only that he was working on "a secret service of some kind." He admitted that by November 1944 he had risen to the rank of foreman of machinists and had unrestricted access to the "tech area" at Los Alamos. He could come and go as he pl[illegible] and he was never subjected to questioning or search. [illegible]ough his work and his privileges he got to know either by sight or personally the scientists who worked in or around the plant—Dr. J. Robert Oppenheimer, director of the entire project; Dr. George B. Kistiakowski, thermodynamics expert of Harvard; Dr. Niels Bohr, known at Los Alamos as "Dr. Baker"; Dr. Harold C. Urey, of the University of Chicago's Institute of Nuclear Fission; and Dr. Walter Koski, Greenglass' immediate director.

When asked how he reacted to Julius' proposal that he steal secrets, Greenglass said he was frightened and refused to do so at first. By the next morning, however, he had overcome his fears and willingly gave his wife the facts she asked for.

Greenglass' testimony made it evident that from this time on he listened and watched alertly for any secret information which came his way. He found out that the materials he was fashioning were important parts of the atomic bomb; he also discovered the estimated power of the bomb; he learned a test explosion was contemplated. Because of his trusted position he could pick up significant facts easily—he even questioned some of the scientists without arousing suspicion.

While he was on furlough in January 1945, Greenglass said, he was able to relay much more information to Rosenberg than he had been able to send the preceding November. He wrote a more complete report of the project and sketched a lens mold which he was working on at the plant and which he knew was to be used in the atomic experiment. Julius showed his approval of the sketch by saying it was good and by paying $200 for it.

During the same furlough, Greenglass added, he was taken by Julius to the corner of First Avenue and Fifty-nir Street where an unnamed Russian asked him about the L. . . This unidentified agent inquired particularly about the high-explosive lenses and about the formula for making them. Greenglass replied simply that he had already given a drawing of the mold and all details to Rosenberg.

Greenglass testified that at one of his meetings with Rosenberg in January, Rosenberg described the bomb being manufactured at Los Alamos. From sources other than Greenglass Rosenberg had learned it was "fissionable material at one end of a tube and on the other end a sliding mechanism with fissionable material, and when the two were brought together under tremendous pressure nuclear reaction was accomplished."[13]

When questioned about Mrs. Sidorovich, Greenglass answered that he remembered the evening he and his wife went to the Rosenbergs' apartment and met the woman. He also recalled that Julius had brought out two halves of the Jello

[13] This description, as far as it went, fitted the uranium bomb which was dropped on Hiroshima eight months later.

box top, had given Ruth one and had explained how they would be used as a recognition signal. His sister Ethel, said Greenglass, had participated actively in making these arrangements.

Greenglass' testimony about Gold's visit to Albuquerque in June was substantially the same as his wife's. He himself had met Gold at the door. Immediately Gold had said, "I come from Julius," and had produced a torn half of the box top. Greenglass let him in and got the other half from Mrs. Greenglass' handbag. It matched the piece Gold brought perfectly. The identification complete, Greenglass gave Gold a sealed envelope containing his most recently acquired information on operations at Los Alamos and a second sketch illustrating the lens mold and the basic principle of the implosion involved in the detonation of the bomb. Gold gave Greenglass an envelope containing $500 in United States currency.

The following September he and his wife made a trip to New York, said Greenglass. As soon as they arrived they called on the Rosenbergs so David could turn over to Julius a sketch, a cross section and a ten-page analysis of the bomb. After reading the report Julius said, "This is *very* good." He brought out a portable typewriter; he and Greenglass made some corrections in the report and Ethel typed it.

On this occasion, said Greenglass, Julius boasted that he had formerly worked for a well-known radio manufacturing company, which had a war-material contract, and he had stolen a proximity fuse from the factory, put it into his brief case, walked out with it and given it to the Russians.

For the purposes of the trial Greenglass had made reproductions of the sketch and the cross section of the bomb he had given to Rosenberg in September. They related, he said, to the plutonium bomb which was dropped on Nagasaki. He swore they were accurate reproductions and the Court admitted them as evidence. Greenglass' analysis of these drawings showed that this machinist had remarkable knowledge of the physics and chemistry involved in the development of

the bomb. With the assurance of an expert Greenglass rattled off the combination of high-sensitive plutonium, high-explosive lenses, condensers, detonators, barium spheres, beryllium spheres, bomb cores, neutrons, bomb switches and barometric pressure devices which brought about nuclear fission and implosion.

Fearful that even now Greenglass was revealing secret information beneficial to an enemy, Judge Kaufman cleared the court, directed the court reporter not to write up this part of Greenglass' testimony and cautioned the newspapermen present "to exercise discretion in what they printed."

Whether or not his technical evidence was understood by the jury, Greenglass told a story which, if believed, compelled three conclusions: he had been an effective spy; he had developed a mass of valuable scientific information relating to the atomic bomb; he had passed this information on to Rosenberg, who in turn had passed it on to Russia.

The major part of Greenglass' testimony dealt with his own espionage transactions with Julius and Ethel Rosenberg; beyond this he added miscellaneous details which were also highly damaging to Rosenberg. He testified he gave Rosenberg names of employees at Los Alamos who might be recruited for espionage. He told of Rosenberg's assignations with Soviet agents in a "remote movie theater alcove" and in "lonesome spots on Long Island." He stated that Rosenberg had once told him Elizabeth Bentley was one of his (Rosenberg's) telephone contacts. Furthermore, he said, Rosenberg had confided to him that he was helping Russia subsidize American students, that contacts in New York and Ohio supplied him with information which was microfilmed and delivered to Soviet agents and that for these activities he received generous rewards in money and gifts from the Russians. Greenglass said that several times after he had been discharged from the army he was offered "Russian money" by Rosenberg so he might continue to study nuclear physics at a college.

The climax to Greenglass' testimony was a dramatic account of Rosenberg's attempt to spirit the Greenglasses out of the United States. Greenglass amplified his wife's explanation with some details which, if true, hinted at the existence of a well-co-ordinated and world-wide network of Russian espionage units. According to David Greenglass, Rosenberg first suggested flight in February 1950, a few days after Fuchs had been arrested in London. He came to the Greenglass home to tell them that Gold was one of Fuchs's American contacts and that the FBI was hot on his trail. It was certain that Gold would be apprehended and that he would lead the Federal agents to the Greenglasses and the Rosenbergs. Both families should leave the country immediately—the Rosenbergs were already planning their flight and the Greenglasses should begin their preparations.

Gold was arrested on May 23. Again Rosenberg rushed to see the Greenglasses and demand that they leave at once. Although the Greenglasses made no definite commitment, Rosenberg evidently assumed that they would comply. He gave David $1,000 and promised him $6,000 more to be paid later. He also proposed that Greenglass, rather than attract attention by applying for passports, should take his family across the Mexican border on a tourist card.

Greenglass outlined an intricate scheme of recognition which Rosenberg had arranged for him:

> Julius made me memorize a form letter which I was to sign with the name "I. Jackson." I was to write to the secretary of the ambassador of the Soviet Republic in Mexico with some favorable reference to the position of the U. S. S. R. in the United Nations. Then I was to wait three days outside the city and stand in a plaza with a statue of Columbus at five o'clock, with my fingers in a guide book. When a man approached me, I was to say, "That is a magnificent statue. I am from Oklahoma and I never saw anything like it." Then the man would say, "There are much more beautiful statues in Paris." That would complete our identification and he would give me money and passports to go on.

From Mexico City Greenglass was to proceed to Veracruz and follow a long route from there through Sweden and Switzerland to a final haven in Czechoslovakia. At each stop he was to write the same letter to the secretary of the Soviet Embassy, sign it "I. Jackson" and wait to be approached by a man who would respond to the recognition signal. Upon arrival at his final destination in Czechoslovakia, he was to sign his own name under the simple statement "I am here" and send the letter to the Soviet Embassy

Rosenberg, said Greenglass, provided $1,000 more for the expenses of the trip. The Greenglasses had passport pictures taken, but apparently made no other preparations to leave.

Emanuel H. Bloch's cross-examination of Greenglass was characterized in contemporary newspaper accounts as "a hammering ordeal." By dramatically worded questions Bloch tried to impeach the witness' testimony in several ways. The attorney suggested that Greenglass was "sore at Rosenberg" because he had lost several thousand dollars in their jointly operated machine shops. Bloch also implied that Greenglass was willing to sacrifice his sister—his "own flesh and blood"—in order to save his wife and himself from punishment for "confessed spying for a foreign government." He showed that Greenglass had performed a number of acts of espionage without suggestion from and out of the presence of Rosenberg—this to create the impression that Greenglass was "working on his own." When Bloch pointed out that Greenglass had not returned any part of the $5,000 given him by Rosenberg, Greenglass said only, "It was out of the Russian pocket." He added that $3,900 of it went to pay his lawyer. At no time did Greenglass weaken or recant any of his direct testimony.

The tension created in the courtroom by Greenglass long recital of treachery was relieved at its close by a single small touch of humor. When asked sarcastically if, in his intimate examination of the Jello box top, he noticed the flavor, Greenglass promptly replied, "Yes, raspberry." This evoked the only laughter that interrupted seventeen days of solemn proceedings.

Harry Gold was brought to the stand to connect the espionage of the Greenglasses and the Rosenbergs to that of Fuchs and himself. He was a well-poised, self-possessed witness and he answered Assistant District Attorney Lane's questions frankly. One of the attending newspaper reporters noted that Gold spoke in a "robust voice" and with carefully chosen words punctuated with appropriately timed gestures. The effect, wrote the reporter, was "an intelligent and forceful delivery."

Gold readily admitted that he had been arrested and indicted for espionage, had pleaded guilty and was at present serving a thirty-year prison sentence. Briefly he described his career as a Soviet agent. In 1935 he had first become a paid worker; up to 1944 he acted mostly as a go-between for Russian agents and persons who procured information for them. His activities were restricted at this time to the Atlantic seaboard area. In March of 1944 he first met his "new Soviet superior." Their prearranged meeting took place on Thirty-ninth Street between Seventh and Eighth avenues in New York City. After an exchange of recognition signals, "John" outlined Gold's work for the future.

This new superior, as the Government learned, was Anatoli Yakovlev, but Gold had not known the agent's real name. "We had a set pattern for those meetings," explained Gold; this meant that regular meetings were always agreed on when Yakovlev and Gold were in personal contact. All emergency meetings were called by Yakovlev. "I could not get in touch with Yakovlev but Yakovlev always knew where to get in touch with me," Gold said. When there was information to be transmitted Gold usually concealed it in a newspaper which he handed to "John." They had worked out signals to warn each other in case they thought they were being watched.

It was at Yakovlev's instruction that Gold first met Fuchs. In June 1944, just a few days after the little, smiling, freshly naturalized British citizen first set foot on American soil, the two men met in a drab street in Woodside, Queens. Their

conversation was brief. Fuchs told Gold about his mission in the United States and promised to give him information "relating to the application of nuclear fission to the production of a military weapon." Gold's job would be to get the material into Russian hands. One week after this meeting Gold passed Yakovlev on a New York street and handed him a newspaper within which was folded a detailed report of the meeting with Fuchs.

Later in the same month Gold and Fuchs met again, this time on the edge of Central Park. Fuchs reported that he was working at a secret laboratory on Church Street "on a joint British-American project aimed at producing an atomic bomb." This was reported a few days later to Yakovlev by means of another "newspaper switch."

Gold had another meeting with Fuchs in July, this time in Brooklyn. Fuchs handed him a sealed package which Gold promptly got into the hands of Yakovlev.

In January of 1945 Gold met Fuchs in Cambridge, Massachusetts. The physicist said he was now working with other scientists on an atomic bomb in "a large experimental station at Los Alamos, New Mexico" and that "a tremendous amount of progress had been made." He described the bomb to Gold, and mentioned particularly a lens which was one of its vital parts. They agreed at this meeting that Gold should come to Santa Fe in June, for by that time Fuchs would have more information on the bomb.

As usual Gold repeated to his superior all Fuchs had told him. When he mentioned the lens, Gold said, Yakovlev became very agitated and made Gold repeat exactly what Fuchs had said. He demanded that Gold "scour [his] memory clean for any scrap of information about the lens."

Late in May—on the last Saturday of the month, Gold thought—Gold and Yakovlev met in a New York restaurant and bar at Forty-second Street and Third Avenue. Gold asked Yakovlev to take a walk with him. Talking in low tones as they walked, they arranged the details of Gold's trip to Santa Fe to see Fuchs. When these were concluded Yakov-

lev told Gold he had a second job for him in New Mexico—a very "vital" one at Albuquerque. Gold objected—he thought it unwise to complicate the Fuchs visit with anything else—but Yakovlev insisted. Gold took his insistence as an order and agreed to act as Yakovlev directed.

Yakovlev then told him he was to get in touch with an agent in Albuquerqe named Greenglass, a technical sergeant in the army who was working on the bomb at Los Alamos. Gold was given a sheet of onionskin paper on which Greenglass' name and address were written. The recognition signals were to be "I come from Julius" and a piece of cardboard—"apparently the top of a food container box cut in an odd shape." Yakovlev told Gold that Greenglass would have the matching piece and that "if Greenglass wasn't there, his wife would have the matching piece and the information which she would turn over" to him. Yakovlev also gave Gold an envelope which he said contained $500 and instructed him to give it to Greenglass. Finally he outlined what Gold described as "a very devious route" which would take him from Santa Fe to Albuquerque.

Gold arrived in Santa Fe on June 2 and received a heavy sealed envelope from Fuchs. He wrote *Doctor* on the outside and proceeded on his journey to Albuquerque.

He reached Albuquerque about eight o'clock in the evening and immediately presented himself at the High Street address written on his slip of instructions. A tall, elderly, white-haired gentleman who answered the door told him the Greenglasses were out and would not return until early the next morning. At 8:30 A.M. the next day Gold returned, this time to be met by a young man. Their greetings were rapidly exchanged.

"Greenglass?" Gold asked.

"Yes," replied the man.

"I come from Julius."

Immediately Gold was ushered into the house; he offered his half of the box top. Greenglass got the other half from a woman's handbag lying on a table. The pieces matched per-

fectly. The identification completed, Gold handed Greenglass the envelope with the $500 in it. Greenglass suggested to Gold that several other workers at Los Alamos could be recruited for espionage work, but Gold discouraged any attempt to contact these people and said that if Greenglass was smart he would never drop the slightest hint that he was furnishing information to Russia. Then Greenglass turned over an envelope which he said contained valuable data. Gold wrote *Other* on the outside of it and prepared to leave. Just as he was going, Mrs. Greenglass remarked that she had recently been in New York and had spoken with "Julius."

On the evening of the day he arrived in New York, June 5, Gold met Yakovlev in Brooklyn. Yakovlev asked Gold whether he had seen "the doctor and the man"; Gold said he had and passed the two envelopes to Yakovlev. Later, said Gold, Yakovlev told him that the information which had come from Greenglass was "extremely excellent and very valuable."

Gold's last meeting with Yakovlev took place on the day after Christmas in 1946, just one day before Yakovlev sailed for Europe.

When he had completed his testimony Gold was allowed to leave the stand without cross-examination. Because Gold had in no way implicated Sobell, this was good tactics on the part of Sobell's attorneys. The only explanation which can be suggested for the Blochs' failure to cross-examine on behalf of the Rosenbergs is that Gold had proved himself to be not only an intelligent and alert witness, but also a partisan one, eager to aid the government in every way he could. The Rosenbergs' counsel may well have decided that cross-examination might only make a bad matter worse.

Several witnesses took the stand to establish the importance of the material allegedly transmitted under Rosenberg's direction. Dr. Walter Koski, who was Greenglass' immediate superior at Los Alamos, and John A. Deery, special assistant to the director of the Atomic Energy Commission, swore that all of the information Fuchs and Greenglass had placed in Rosenberg's hands was highly secret—no one was supposed

to have access to it except authorized scientists working on the project. These authorities also examined the reproductions of the blueprint and cross section Greenglass had passed to Rosenberg and pronounced them accurate descriptions of the atomic bomb dropped on Nagasaki. The witnesses agreed that the information these drawings imparted would be of inestimable advantage to a nation which did not possess the secret of nuclear fission. Colonel John Lansdale, Jr., in charge of security measures at Los Alamos, assured the jury that secrecy about the atomic bomb was an essential factor in the future security of America. Altogether these witnesses showed that if Sobell and the Rosenbergs had committed the crimes they were charged with, they had seriously jeopardized the security of the United States.

Elizabeth Bentley, an eager witness for the Government, indicated the extensive reach of the Russian espionage organization. She declared that the American Communist party was an integral part of the Communist International at Moscow and was subject to its orders. Disobedience of such orders or deviation from the party line meant expulsion of the offending member. Miss Bentley also told that through more than thirty contacts she had been able to secure highly secret official information. She had passed it on, first to Jacob Golos, a high-ranking Soviet agent, and after Golos' death to Anitol Gromov, the first secretary of the Russian Embassy.

In describing some of her own espionage work she revealed that among her contacts was a man from Knickerbocker Village who frequently telephoned her and identified himself as "Julius." Once, she said, she had accompanied Golos to Knickerbocker Village when he had had to pick up a report from an agent there. Miss Bently said she did not know who the man was.

In his cross-examination of Miss Bentley, Emanuel Bloch concentrated more on her character than on the facts she revealed about Rosenberg. He led her to admit (and she did so readily) to her complete subjection to Communist dictation, and her espionage from 1935 until her reconversion to

Americanism in 1945. Since then, she admitted, she had testified frequently before grand juries and Congressional committees, giving the names and detailing the activities of her erstwhile associates. She acknowledged that she had never been indicted for espionage, was traveling about the country to lecture for pay on her experiences and was preparing a book on Russian espionage from which she hoped to obtain additional revenue. To one of Bloch's more brutal questions she replied that she had lived with Jacob Golos "outside marriage." When the examiner asked whether she had been Golos' mistress she said she "did not feel called upon to characterize the relationship."

The Government's case had opened with testimony against Sobell. It concluded, on March 21, with proof that Sobell had been extradited from Mexico; a government immigration inspector produced the official records of the deportation and arrest.

As soon as the district attorney declared that the Government rested its case the defense lawyers made a series of motions for the defendants—to dismiss the case, to strike out vital evidence and, those failing, to declare a mistrial because of prejudicial evidence and prejudicial occurrences permitted during the trial. All motions were promptly overruled by the Court and the defense was ordered to proceed.

Julius Rosenberg took the stand in his own defense. Under the direct examination of his lawyer, Emanuel Bloch, he summarized the important stages of his life—his schooling, his marriage to Ethel Greenglass and his appointment in 1940 to a civil-service position as a junior engineer in the Signal Corps of the United States Army. Then Mr. Bloch directed his questions to the present charge:

Mr. Bloch: Did you ever have any conversation with Ruth Greenglass about November 1944 with respect to getting information from David Greenglass at the place where he was working?

Mr. Rosenberg: I did not.

Q. Did you know in the middle of 1944 where David Greenglass was stationed?

A. I did not.

Q. Did you know in the middle of 1944 that there was such a project known as the Los Alamos project?

A. I did not.

Q. Did you ever give Ruth Greenglass $150, or any other sum for her to go out to visit her husband at Los Alamos for the purpose of trying to enlist him in espionage work?

A. I did not.

Q. I show you Government's Exhibit 2 [the sketch and cross section of the bomb] and ask you whether or not David Greenglass ever delivered to you a sketch similar to the sketch you hold in your hand in January 1945?

A. He did not deliver such a sketch. I never saw this sketch before.

Q. Did you know that he was working at the Los Alamos project?

A. No, I did not.

Q. Did you associate work David Greenglass was working on in New Mexico with any project developing the atom bomb?

A. I did not.

Q. Did you at any time during David Greenglass' furlough in New York in January 1945 describe to him an atom bomb?

A. I did not.

Q. Could you describe an atom bomb today, or how an atom bomb works, or the component parts of an atom bomb and the functions of each part?

A. Well, I heard in court a description of an atom bomb and outside of that I have never heard a description like that before, and I would say that I cannot repeat that description.

Q. Did you ever take courses in nuclear physics?

A. I did not.

Q. Or in advanced physics?

A. I did not.

Following the trial record of the testimony of Ruth and David Greenglass practically line by line, Mr. Bloch asked Rosenberg whether he had ever made any of the statements they had attributed to him. To every such question the defendant gave the same answer: "I did not." He denied that

he had stolen a proximity fuse from a radio company he worked for and that he had told Greenglass he had done so. He disclaimed all knowledge of the Jello box top and the alleged conversations concerning it. He said he had never introduced Greenglass to a Mrs. Sidorovich. He denied knowing Elizabeth Bentley and ever conversing with her on the telephone. He had not, he said, tried to induce the Greenglasses to leave the country nor had he provided money for the trip. He denied, finally, that he and his wife had ever contemplated or planned a flight from the United States.

Throughout his direct examination Rosenberg was self-assured; he gave his answers quickly and positively. Under District Attorney Saypol's cross-examination his confidence began to waver. Saypol forced him to admit that he had been discharged from his civil-service job because he was suspected of being a Communist.

"Were you a member of the Communist party?" the district attorney asked bluntly.

After a pause Rosenberg replied, "I refuse to answer on the ground that it might tend to incriminate me."

Saypol pursued the point. "Did you, in February of 1944, transfer from Club 16 B of the industrial division of the Communist party to the Eastern Club in the First Assembly District of New York with transfer number 12179?"

Again Rosenberg took refuge in "I refuse to answer on the ground that it might tend to incriminate me."

Impatient with these noncommittal answers, Mr. Saypol produced a letter from Rosenberg to the commanding general of the Signal Corps. The attorney read aloud: "I am not now and never have been a member of the Communist party." Then he demanded, "Was that statement true then and is it true now?"

But he drew the same answer—"I refuse to answer on the ground that it might tend to incriminate me."

There were many more questions about Rosenberg's alleged affiliations with the Communist party. The defendant refused to answer all and finally, in an effort to end this line

of questioning, declared rather testily that he would refuse to answer all such questions. The Court sustained the witness' objection to incriminating questions and ruled that he was not required to answer them.

Rosenberg strongly protested his loyalty to the United States:

I heartily approve our system of justice as performed in this country, Anglo-Saxon jurisprudence. I am in favor, heartily in favor, of our Constitution and Bill of Rights. I owe allegiance to my country at all times. I will fight for this country if it were engaged in a war with any other country. I felt in 1945 that the Soviet Government had improved the lot of the underdog there, has made a lot of progress in eliminating illiteracy, has done a lot of reconstruction work and built up a lot of resources. I felt and still feel that they contributed a major share in destroying the Hitler beast who killed six million of my coreligionists, and I feel emotional about that thing.

Judge Kaufman interposed, "Did you approve the communist system of Russia over the capitalistic system of this country?"

Rosenberg answered evasively with "I am not an expert on those things, Your Honor, and I did not make any such statement."

The judge then wanted to know, "Did you ever belong to any group that discussed the system of Russia?"

Once again Rosenberg ducked the question: "Well, Your Honor, I feel at this time that I refuse to answer a question that might tend to incriminate me."

With that Julius Rosenberg completed his testimony and his defense.

Ethel Rosenberg followed the pattern set by her husband. She protested she was a loyal citizen of the United States and had never engaged in espionage. Firmly she declared that everything her brother and his wife had testified to was false. When cross-examined about her affiliations with the Commu-

nist party, she consistently answered, "I refuse to answer on the ground it might tend to incriminate me."

And that was the testimony and defense of Ethel Rosenberg.

The third defendant, Morton Sobell, did not take the stand.

The Government's rebuttal pertained mostly to subsidiary details and was brief. A New York commercial photographer testified that sometime during mid-June of 1950 the Rosenbergs and their two children had three sets of passport pictures taken at his studio. Mr. Rosenberg, the witness said, had explained that they were going to France to look at some property Mrs. Rosenberg owned there. An employee in the office of Mr. O. John Rogge, Greenglass' attorney, said that on June 13, 1950, one of Mr. Greenglass' relatives came to the office with $3,900 in a paper bag and retained Mr. Rogge for Greenglass.

Emanuel Bloch's argument in defense of the Rosenbergs was directed from various angles to a single target: the unreliability of the Greenglasses as witnesses. Repeatedly he pointed out that the only evidence against Ethel and Julius Rosenberg came from the Greenglasses, themselves confessed spies. They had, he insisted, "sold the prosecution a bill of goods in an effort to obtain leniency for themselves."

Bloch asked the jurors:

Don't you think that the Greenglasses put it over on the Government when Ruth Greenglass was not even indicted? She walked out and put Greenglass' sister in. David Greenglass was willing to bury his sister and her husband to save his life. Not only are the Greenglasses self-confessed spies, but they are mercenary spies. They'd do anything for money and they are trying to murder people for money. Any man who will testify against his own flesh and blood, his own sister, is repulsive, revolting, and is violating any code of civilization that ever existed. He is lower than the lowest animal I have ever seen.

Mr. Bloch persistently avoided mention of the Jello box top; he did not try to explain how Harry Gold got the half which matched a piece Greenglass swore Rosenberg had given him. Mr. Bloch is not to be criticized. What could any advocate have done with that damning bit of adverse testimony except contend that all who spoke of it had lied?

The defense was closed by Mr. Kuntz, who made the only possible argument in favor of Sobell. After all, Sobell had fled to Mexico—that could not be disputed. Evidence showed he had belonged to the Communist party. But no evidence connected him with Fuchs, Gold, the Greenglasses and the Rosenbergs. Only Max Elitcher had implicated Sobell in a spy plot. So Kuntz argued that Elitcher, who by his own testimony had convicted himself of espionage was trying to buy immunity from the government by testifying against Sobell. Elitcher was, said Kuntz, utterly unworthy of credence.

District Attorney Saypol's summation was vigorous, his pointing up of the evidence challenging and his analysis of its implications sinister. He maintained that the evidence against Sobell and the Rosenbergs came not only from Greenglass and his wife, but also from Gold and other Government witnesses; and, he added, all this testimony was corroborated by written evidence. The prosecutor also rehearsed in detail the workings of the Russian underground as they had been revealed by the successive testimony of Gold, Elitcher and the Greenglasses. The conspiracy had been proved, Saypol declared, and the ringleaders had been caught.

To meet the attack which had been made upon the character of the Government's star witnesses Saypol said, "The Greenglasses have told the truth. They have tried to make amends for the hurt which has been done to our nation and to the world."

In defense of Gold the prosecutor said, "Harry Gold has been sentenced to thirty years, the maximum term of imprisonment. He can gain nothing by testifying as he did in this courtroom except the inward relief of having told the

truth. Harry Gold forged the link that points indisputably to the guilt of the Rosenbergs, and he was not even asked one question on cross-examination."

The unreliable testimony came, maintained Saypol, from the Rosenbergs. They had denied planning to leave the United States, but a disinterested photographer had sworn on the stand that they had had passport photographs taken and had spoken of a trip to France. "The Rosenbergs," concluded Saypol, "have magnified their treachery by lying here."

Saypol described once again the use of the Jello box top and asserted that this piece of tangible evidence established the connection among Rosenberg, Gold, Greenglass and Yakovlev. That Rosenberg gave Greenglass the piece that matched Gold's was, declared the prosecutor, "convincing proof."

To stress Ethel Rosenberg's complicity Saypol recounted how she had typed the ten-page report on the atomic bomb. "Just so," he charged, "had she on countless other occasions sat down at that typewriter and struck blow after blow at her own country in behalf of the Soviet Union."

Furthermore, the attorney contended, the Rosenbergs were linked with Sobell in their espionage activities:

> They were classmates together at City College in 1938. . . . Sobell and the Rosenbergs were joined by the common bond of communism and devotion to the Soviet Union. Sobell and his family flew to Mexico in the same month that Greenglass was paid by the Russians through Rosenberg to flee to Mexico. His conduct fits the pattern of membership in this conspiracy and flight from an American jury when the day of reckoning had come."

Saypol's conclusion was delivered in ominous tones:

> The crime charged here is one of the most serious that can be committed against the United States. No defendants ever stood before the bar of American justice less deserving of sympathy than these three. I am confident you will render

the only verdict possible—guilty as charged as to each of these three defendants.

On March 28, at 3:30 P.M., Judge Kaufman began his carefully prepared charge to the jury. It measured up to the finest tradition of the Federal courts. He emphasized the presumption of innocence; he explained that the Government was obliged to overcome that presumption by proving the crime beyond a reasonable doubt; he soberly and accurately defined reasonable doubt and circumstantial evidence.

With strict impartiality Judge Kaufman analyzed the indictment and translated it into laymen's terms. The conspiracy with which the defendants were charged was criminal because: (1) The information transmitted was secret; (2) The information concerned our national defense; (3) The information was transmitted to a foreign nation, the Soviet Union, or its agents; (4) The information was given to Russia so that she might use it to her own advantage.

At this point the judge stated clearly the various facets of the law against conspiracy and of the tests to be applied in evaluating the testimony of confessed accomplices. Such testimony, he said, must be carefully weighed and acted on with caution. But under Federal law it might be the basis of a conviction if it convinced the jury of the guilt of the defendants.

The Court also explained that the flight of a defendant after a charge made or about to be made against him did not create a presumption of guilt; it was, however, legitimate ground for an inference of a guilty mind and a proper circumstance for the jury to consider.

The jury was charged in unequivocal language that Sobell could not be convicted unless it believed the testimony which Elitcher had given against him. "I charge you," said the Court, "that if you do not believe the testimony of Max Elitcher as it pertains to Sobell, then you must acquit the defendant, Sobell."

The jury was also instructed that the fact that Sobell did

not take the stand was not to be considered as evidence against him or against any of the other defendants, or as the basis of any presumption against him or them.

Judge Kaufman's charge concluded with this stern injunction:

If you find that the law has not been violated you should not hesitate for any reason to render a verdict of not guilty; but, on the other hand, if you find that the law has been violated, as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

The instructions to the jury lasted nearly an hour and a half. It was 4:53 in the afternoon when the jury retired. On the following morning at 11:00 A.M. it returned to the courtroom and pronounced all three defendants guilty as charged.

Eight days later, on April 5, the defendants were brought before the bar of the court for sentence. In the crowded but tensely silent courtroom they listened to Judge Kaufman's solemn pronouncement:

It is ironic that the very country which these defendants betrayed and sought to destroy placed every safeguard around them for obtaining a fair and impartial trial, a trial which consumed three weeks in this court. . . . This type of trial would not have been afforded to them in Russia. Certainly, to a Russian national accused of a conspiracy to destroy Russia not one day would have been consumed in a trial. Yet [the defendants] made a choice of devoting themselves to the Russian ideology of denial of God, denial of the sanctity of the individual, and aggression against free men everywhere instead of serving the cause of liberty and freedom.

Speaking directly to the defendants the judge said:

Your crime is worse than murder. Plain, deliberate, contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the crime of murder the criminal kills only his victim. The immediate family is brought to grief, and when justice is meted out the

chapter is closed. But in your case I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused the communist aggression in Korea, with resulting casualties exceeding 50,000 Americans, and who knows but that millions more of innocent people may pay the price of your treason?

Once again Judge Kaufman defined the criminal acts of the defendants for all present:

The evidence indicates quite clearly that Julius Rosenberg was the prime mover in this conspiracy. However, let no mistake be made about the role which his wife, Ethel Rosenberg, played in this conspiracy. Instead of deterring him from pursuing his ignoble cause, she encouraged and assisted the cause. She was a mature woman—almost three years older than her husband and almost seven years older than her younger brother [David]. She was a full-fledged partner in this crime. . . . Julius and Ethel Rosenberg placed their devotion to their cause above their own personal safety and were conscious that they were sacrificing their own children should their misdeeds be detected—all of which did not deter them from their course. . . .

Finally the sentence was pronounced. Judge Kaufman spoke with feeling:

What I am about to do is not easy for me. I have deliberated for hours—days and nights. I have carefully weighed the evidence. . . . I am convinced beyond any doubt of your guilt. I have searched the records—I have searched my conscience—to find some reason for mercy, for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my hands were I to show leniency to the defendant Rosenbergs. . . . The sentence of the court upon Julius and Ethel Rosenberg is that for their crime they are sentenced to death.

The sentence will be executed according to law in the week beginning on Monday, May 21.

To Sobell the Court said:

While I have not the slightest sympathy for you or any of your associates, I must, as a judge, be objective in the examination of the evidence in this case. I do not for a moment doubt that you were engaged in espionage activities. However, the evidence in this case did not point to any activity on your part in connection with the atom bomb project. I cannot be moved by hysteria or motivated by a desire to do the popular thing. I must do justice according to the evidence in this case. There is no doubt about your guilt but I must recognize the lesser degree of your implication in this offense. I, therefore, sentence you to the maximum prison term provided by statute, to wit, thirty years.

The following day David Greenglass stood at the bar of the court to receive sentence on his plea of guilty. Judge Kaufman said he was moved to leniency by Greenglass' prompt confession and by the aid he had given to the Government in prosecuting the "higher-ups." Greenglass' punishment was fixed at fifteen years' imprisonment.[14]

On the same day the Rosenbergs and Sobell filed notice of appeal.

On April 11 Mrs. Rosenberg was taken to Sing Sing and placed in a cell in the women's section of the death house. Julius Rosenberg remained in New York City in the Federal House of Detention. May 26 was fixed as the date of their execution.

## AFTERMATH

May 26, 1951, passed. There was no execution. There were so many undetermined motions and pending appeals that a succession of court orders extended the date, ultimately

[14] Greenglass began serving his sentence in the penitentiary at Lewisburg, Pennsylvania, on July 6.

until the week of June 15, 1953. The interim was filled with unremitting efforts by many people to alter the fate of the Rosenbergs.

On April 19, 1951, the defense counsel petitioned the Court to have Mrs. Rosenberg removed from the Sing Sing death house. It was argued that such confinement was unnecessarily cruel and that to make the prisoner "break down" and "talk" the authorities were jeopardizing her health. When the petition was heard by District Judge Henry W. Goddard on May 2, doctors called by the Messrs. Bloch testified that Ethel Rosenberg's continued incarceration in the death house would impair her health seriously and might even drive her insane. Other doctors called by the Government gave exactly contrary opinions, and Judge Goddard dismissed the petition.

Meanwhile, Julius Rosenberg had been removed to the male section of the death house.

On January 10, 1952, the Rosenberg and Sobell counsel appeared before Justices Swan, Chase and Frank of the United States Court of Appeals to argue for a reversal of the judgment of conviction or for a modification of the sentence. They were opposed by Messrs. Lane, Kilsheimer and Cohn for the Government. On January 25 the Court handed down its decision. The justices unanimously decreed that they had no authority, under the precedent of previous cases, to consider modification of the sentences passed by the district court. Justices Swan and Chase upheld the conviction of Sobell, but Justice Frank dissented. The evidence, said Justice Frank, tended to show two separate conspiracies and the question of Sobell's alleged complicity in the Gold-Yakovlev-Greenglass-Rosenberg conspiracy had not been adequately presented to the jury by the trial court's instructions.[15] For this reason he held Sobell was entitled to a new trial.

The defendants, through their counsel, took immediate steps to obtain a further review by the Supreme Court of the United States. It was October 13, 1952, before the Su-

[15] 195 F. (2d) 583; rehearing denied April 6, 1952.

preme Court handed down its decision. Then, by a division of eight to one (Mr. Justice Black dissenting) the Court refused to disturb the judgment of the Court of Appeals.[16]

The debate now spread from the courts to the citizenry. Hard on the heels of the Supreme Court's decision came the announcement that a National Committee to Secure Justice for the Rosenbergs had been formed. Its headquarters were given as 1050 Sixth Avenue, New York City. The names of many of the members were already familiar to the public. They were persons who at various hearings before Congressional committees had asserted their constitutional privilege against self-incrimination when asked whether they were or ever had been Communists.

The agitation which followed the formation of this committee recalled the engineered reaction which thirty years before had followed high court affirmance of the convictions of Sacco and Vanzetti. Pickets, working in shifts and carrying signs demanding commutation of the sentences of the Rosenbergs, kept up a continuous parade in front of the White House. Petitions demanding executive clemency circulated in every large city of the United States.

One of the most notable of these public demonstrations occurred early in the morning on December 21. A crowd of more than seven hundred men, women and children took a special train to the Sing Sing prison station at Ossining, New York. They had been recruited by a so-called Civil Rights Congress—an organization listed by the Attorney General of the United States as subversive. Because their projected journey had been advertised in the communist *Daily Worker,* the prison authorities were ready to receive them. The prison guard had been reinforced by regular and sworn-in local police, and barricades had been erected at the prison entrance. The mob could not even approach the prison and late in the evening abandoned its siege to return to New York.

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[16] 344 U. S. 838.

Agitation for the Rosenbergs was not confined to America. The French Communists demonstrated. Communist China's All China Federation of Labor cabled President Truman from Peiping to protest the execution of the death sentences. Twenty rabbis and religious leaders in Jerusalem joined in a plea to the President for leniency—the burden of their argument was that "the death sentence for a political crime in time of peace was without precedent." East Berlin's radio blared that the death sentence for the Rosenbergs was "more hypocritical than that against Sacco and Vanzetti."

But if many people objected to the Supreme Court's refusal to review the case, not all reaction was negative. The responsible American Civil Liberities Union announced that it had carefully examined the trial record and had found no evidence that political or religious considerations had influenced the convictions. The organization also declared that the sentences of death were not disproportionate to the enormity of the crime.

While the public debated the case, counsel for the Rosenbergs and Sobell were petitioning the Supreme Court for a rehearing. One Royal W. France, a New York lawyer purporting to represent the National Committee to Secure Justice for the Rosenbergs, asked to be allowed to intervene and file a brief as *amicus curiae* (a friend of the court). The Lawyers Guild and a Dr. W. E. Dubois filed similar petitions. Accompanying these various pleas for rehearing was a petition protesting the death sentences which was said to bear the signatures of 50,000 persons.

The combined efforts were unavailing. On November 17 the Supreme Court denied the petitions.[17]

It was then announced that Sobell was to be taken to Alcatraz to commence his thirty-year sentence. New lawyers for Sobell asked Judge Kaufman not to consign their client to the dreaded "Rock"—a prison made notorious by Al Capone and other convicted gangsters and desperadoes who served

[17] 344 U. S. 889.

time there. Judge Kaufman ruled that the disposition of Sobell was in the hands of the Attorney General; he declined to interfere.

The next action of the defense counsel was a motion in the federal district court to set aside the judgment of conviction.[18] The principal ground urged was that the government's investigating and prosecuting agencies had, before and during the trial, released publicity which had prejudiced the defendants in the popular mind. It had been impossible, said defense counsel, for the Rosenbergs and Sobell to obtain the impartial jury guaranteed by the Constitution to every citizen accused of a crime. It was also contended, as it had been on previous appeals, that the defendants had been convicted solely on the testimony of confessed accomplices, who were shown by the record and were known by the Government prosecutors to be perjurers.

Because this proceeding was essentially a review of his own judgment against the Rosenbergs, Judge Kaufman asked that another judge be named to hear it. Accordingly the Honorable Sylvester J. Ryan, one of the other district judges, was assigned to act upon the motion.

On December 10 Judge Ryan ruled that the motion was without legal merit. Once again the Rosenbergs and Sobell through their counsel perfected an immediate appeal. The case was advanced and the parties given an early hearing. On the last day of December the Court of Appeals unanimously affirmed Judge Ryan's decision.[19]

The Blochs' repertory was not yet exhausted. On Christmas Day they announced that they would apply to Judge Kaufman for a modification of sentence.[20]

The petition was filed on December 29. The essence of it

[18] This proceeding was pursuant to Federal law—Title 28, United States Code, Sec. 2255.

[19] 200 F. (2d) 666.

[20] This was pursuant to Rule 35 of the Federal Rules of Criminal Procedure, which provides that at any time within sixty days after a conviction has been affirmed on appeal, the district court may entertain a petition to reduce sentence.

was that the sentence, *on a comparative basis,* was excessive—May, Fuchs, Gold, Tokyo Rose and Axis Sally had all received prison terms rather than death. Furthermore, the petition read, the Joint Congressional Committee on Atomic Espionage had not, in its recent report, listed the Rosenbergs with others as "prime movers" in the atomic spy ring; "the trial court's statement . . . that [the Rosenbergs] were responsible for the Korean war was far-fetched"; the Government's witnesses, David and Ruth Greenglass and Harry Gold, were perjurers. The petition even contended that no real crime had been committed—the information which the Government claimed had been given to Russia was not secret, but public. And Russia, when she supposedly received the information from the Rosenbergs, was an ally of the United States, not an enemy—hence no harm was done or intended to be done to the United States security.

This petition placed a heavy emphasis on a number of letters from private citizens in the United States, Great Britain, Australia, Mexico and Japan, which accompanied the petition and urged clemency. Among these was a letter from Dr. Harold C. Urey—famous nuclear scientist, Nobel prize winner and head of the Institute of Nuclear Fission at the University of Chicago. Dr. Urey wrote that he had read the transcript of the evidence and found the testimony of the Rosenbergs more believable than that of the Greenglasses. The burden of practically all of the letters was that the Rosenbergs had been convicted on the testimony of "informers" and the punishment meted out to them was disproportionate to that given to confessed atom spies.

Judge Kaufman immediately undertook the hearing of the petition and listened attentively to exhaustive arguments on both sides. On January 2, 1953, he read his carefully written decision. In it he considered all of the arguments that had been urged in the Rosenbergs' behalf. In concluding he pointed out that the Rosenbergs had been sentenced one year and nine months before and had carried their appeals through all of the appropriate appellate courts—no recourse, he said,

had been denied them and no court had been able to find any reversible error or any legal justification for setting the verdict aside. He then reiterated his own opinion.

This Court has no doubt but that if the Rosenbergs were ever to attain their freedom they would continue in their same deep-seated devotion and allegiance to Soviet Russia, a devotion which has caused them to choose martyrdom and to keep their lips sealed. . . . I have meditated and reflected long and difficult hours over the sentence in the case. I have studied and restudied the record and I have seen nothing, nor has anything been presented to me to cause me to change the sentence originally imposed. I still feel that their crime was worse than murder. Nor have I seen any evidence that the defendants have experienced any remorse or repentance. . . . The application is denied.

The reaction to Judge Kaufman's decision was mixed. Some of the ever-present pickets in front of the White House became boisterous and were arrested and charged with disorderly conduct. The National Committee to Secure Justice for the Rosenbergs held nightly mass meetings in cities throughout the East. The organization of a similar committee in Canada was announced. French Communists issued a statement from Paris deploring the decision and calling the Rosenbergs "American patriots."

There was also approval. French conservative newspapers deplored the activities of the Communists and said they were not representative of the feelings of the Republic. The Commander of the Jewish War Veterans complimented Judge Kaufman on his "courageous decision." The Committee for Cultural Freedom issued a statement opposing clemency "unless the Rosenbergs acknowledged their guilt and told us all they knew."

Immediately after Judge Kaufman's decision, the Messrs. Bloch announced they would present their appeal for clemency to the President of the United States. Judge Kaufman granted a stay of execution to allow time for the appeal.

On January 8 Sobell filed a plea with District Judge Kauf-

man for a reduction in his sentencee. It was promptly heard and denied.

The Rosenbergs' plea for executive clemency was presented to President Truman on January 11. As if in answer to the repeated suggestions or intimations that they might secure clemency "if they talked" Ethel Rosenberg's petition contained the following:

> We are conscious that were we to accept this verdict, express guilt, penitence or remorse, we might more readily obtain a modification of our sentences. But this course is not open to us. We are innocent, as we have proclaimed and maintained from the time of our arrest. This is the whole truth. To forsake this truth is to pay too high a price even for the priceless gift of life—for life thus purchased we could not live out with dignity and self-respect.

A flood of letters and petitions poured into the President's office. Most of these urged the President to commute the sentences. Albert Einstein, world-famous scientist, wrote that he took his stand with Dr. Urey and thought the sentences should be modified. A group of 3,000 lawyers joined in a petition which declared that "the death penalty would not conform to the great pattern of Anglo-Saxon jurisprudence." Fifteen hundred clergymen signed a petition which deplored the vengeance of the law and asked for "a justice tempered with mercy" for the convicted spies.

There was reason to believe that much of this apparent interest in clemency for the Rosenbergs was inspired by organized solicitation. The bar, the clergy and the public generally had been thoroughly "circularized." One of the members of the district court jury which had convicted the Rosenbergs reported that he had been solicited to sign a petition urging clemency and had refused. Investigation revealed that each of the other jurors had been approached and with a similar result.

President Truman failed to act on the petition during the ten remaining days of his term and the obligation of decision

was cast upon his successor. On February 11 President Eisenhower issued a short and blunt statement denying the plea:

I have given earnest consideration to the records in the case of Julius and Ethel Rosenberg and to the appeals for clemency made in their behalf. These two individuals have been tried and convicted of a most serious crime against the people of the United States. They have been found guilty of conspiring with intent and reason to believe that it would be to the advantage of a foreign power, to deliver to the agent of that foreign power certain highly secret atomic information relating to the national defense of the United States.

The nature of the crime for which they have been found guilty and sentenced far exceeds that of the taking of the life of another citizen; it involves the deliberate betrayal of the entire nation and could very well result in the death of many, many thousands of innocent citizens. By their act these two individuals have in fact betrayed the cause of freedom for which free men are fighting and dying at this very hour.

We are a nation under law and our affairs are governed by the just exercise of these laws. The courts have provided every opportunity for the submission of evidence bearing on this case. In the time-honored tradition of American justice, a freely selected jury of their fellow citizens considered the evidence in this case and rendered its judgment. All rights of appeal were exercised and the conviction of the trial court was upheld after four judicial reviews, including that of the highest court of the land.

I have made a careful examination into this case and am satisfied that the two individuals have been accorded their full measure of justice.

There has been neither evidence, nor have there been mitigating circumstances which would justify altering this decision, and I am determined that it is my duty, in the interest of the people of the United States, not to set aside the verdict of their representatives.

Despite the President's unequivocal pronouncement controversy and agitation over the impending execution of the Rosenbergs continued. Newspapers throughout America almost uniformly approved the President's action. From overseas came some angry criticism. The East German radio

broadcast tirades against "the Wall Street hangmen." The Paris Communists kept up an almost continuous clamor. At one of their protest meetings, attended by more than 12,000 persons, the agitators displayed a twenty-foot picture of the Rosenbergs and their hapless children. Red orators denounced "the American warmongers" as "murderers."

The attorneys for the Rosenbergs had previously announced their intention to petition the Supreme Court of the United States to review the decision of the Court of Appeals which had affirmed Judge Ryan's denial of their motion to set aside the judgment of conviction. As soon as the President had denied their plea for a commutation of the sentences they announced their intention of prosecuting this appeal.

On May 25 the Supreme Court of the United States denied the petition by a vote of seven to two (Justices Black and Douglas dissenting).[21] On the following day it denied a petition for a reconsideration.

On May 29 District Judge Kaufman, on motion of the United States Attorney, reset the date of the Rosenbergs' execution for the week of June 15.

And then ensued a series of frantic maneuvers to save the Rosenbergs from the chair.

On June 1 defense counsel Emanuel Bloch applied to District Judge Kaufman for a reduction of the sentence of the Rosenbergs to twenty years' imprisonment. The motion was based on the fact that the maximum punishment permitted under the Espionage Act was twenty years' imprisonment *unless the violation occurred in time of war.* If reasonably interpreted, claimed Bloch, this could only mean a war with the foreign country to which the information affecting the national defense had been communicated.

The point had previously been made before Judge Kaufman, and was promptly overruled. A similar motion was made in the Court of Appeals and denied on June 5.

The next move was an application for a new trial in the

[21] 354 U. S. 965.

district court on the ground of "newly discovered evidence." After hearing the arguments of counsel Judge Kaufman ruled that the allegations concerning the newly discovered evidence were "too flimsy" to merit serious consideration.

Bloch's third arrow was aimed at the public. On June 3 he gave a statement to the press that Federal Prison Director James V. Bennett, acting for Attorney General Brownell, had approached the Rosenbergs with the proposition that their sentences would be commuted to life imprisonment provided they made full confessions and exposed the still-hidden members of the spy ring. With this statement, he released the written reply of the Rosenbergs:

> By asking us to repudiate the truth of our innocence the Government admits its doubts concerning our guilt. We will not help to purify this foul record of a fraudulent and a barbarous sentence. We solemnly declare now and forever more that we will not be coerced even with the fear of death to bear false witness and to yield up to tyranny our rights as free Americans. Our respect for truth, conscience and human dignity is not for sale. If we are executed it will be the murder of innocent people and the shame will be upon the Government of the United States.

On June 9 the public was informed that an application had been made to the United States Supreme Court by Bloch and associate counsel—John F. Finnerty of New York and Professor Malcolm Sharpe of the University of Chicago Law School—for a stay of execution. It was presented to Associate Justice Jackson on June 12. The justice heard the arguments of counsel for the defense and the opposing arguments of Government counsel and announced he would seek the advice of the full Court.

At its regular session on the following Monday the Court voted five to four against granting the stay. It denied a renewed motion to review the case by a vote of seven to two.[22] An application for leave to file a petition for an original writ

[22] 345 U. S. 989; rehearing denied, 345 U. S. 1003.

of habeas corpus, which would have insured a review of the case, was denied by a vote of seven to one.[23]

As the time for the execution drew near agitation here and abroad took on a new vigor. The number of pickets parading in front of the White House increased. It was estimated that on Sunday, June 14, there were between six and eight thousand people jamming the streets. Rosenberg's mother and his two children were featured participants. Many new placards were hoisted—some of them definitely scurrilous.

Delegations of ministers—one of them led by Dr. Bernard Loomis, Dean of the University of Chicago School of Religion—waited on the President to plead for clemency. Dr. Harold C. Urey renewed his former request and, according to Mr. Bloch's statement, telegraphed the President that the case against the Rosenbergs "outrages logic and justice."

Hundreds of letters from all sections of the country and from all kinds of people poured in on the President. A few expressed the hope that the Chief Executive would let justice take its course, that making an example of the Rosenbergs would do more than anything else to protect America from spies and traitors. But most of the letters pleaded for clemency.

Abroad there was hardly less feeling than here at home. From London the Transport and General Workers Union—Great Britain's largest labor union—sent a petition for clemency. As if to supplement that action, several thousand shouting marchers paraded, eight abreast, outside the American Embassy in London. In far off Melbourne, Australia, the American Embassy was besieged by a screaming mob. The Archbishop of Paris, Maurice Cardinal Felton, appealed to the President to spare the lives of the Rosenbergs "in the name of charity and peace." The United States Embassy in Paris revealed that during the first half of June it had received over 3,000 letters urging clemency.

There were Communist agitations for the Rosenbergs in East Berlin.

[23] 346 U. S. 271.

Poland, in an official communication to the American Minister in Warsaw, offered asylum to the Rosenbergs if the President pardoned them. The State Department at Washington called this unprecedented action "officious intermeddling" and "gross impertinence."

On Tuesday, the sixteenth, simultaneous applications were made to District Judge Kaufman and Associate Supreme Court Justice Douglas for a stay of execution and a reconsideration of the case on the ground that the district court had been without jurisdiction to impose the death penalty in the absence of a recommendation from the jury to that effect. These petitions were presented not by the Rosenbergs' attorneys of record, the Messrs. Bloch, but by Mr. Daniel G. Marshall of Los Angeles, California, and Mr. Fyke Farmer of Nashville, Tennessee. These attorneys claimed they represented a citizen of Los Angeles, one Irwin Edelman, who had interested himself in the case. Judge Kaufman said these new lawyers were "interlopers" and refused them a hearing.

With Justice Douglas the volunteer counsel had more success. He listened patiently while they elaborated a point which had not been raised before in any of the hearings. The crux of their argument was that the Espionage Act, under which the Rosenbergs and Sobell had been tried, had been passed in 1917—long before atomic bombs were dreamed of. For a violation of that statute committed in time of war, the Court, without a recommendation from the jury, had the right to impose a sentence of death or imprisonment for not more than thirty years. But, they said, in 1946 Congress had passed the Atomic Energy Act. Under that act, which they claimed superseded the 1917 Espionage Act, the Court could not impose a death sentence except on the recommendation of a jury.

Justice Douglas was so much impressed that he ordered an indefinite stay of execution in order that the point could be fully argued and deliberated. His action came as a bomb shell. Although the newspapers predicted that the execution, if it ever occurred, would be postponed for at least two years, the Attorney General acted promptly. He requested Supreme

Court Chief Justice Vinson to summon all of the judges into extraordinary session, to be convened at twelve o'clock on June 18—the day set for the execution. For three hours Court listened to the opposed contention. Defense counsel argued their point. The Government's attorneys answered vigorously that the crimes for which the Rosenbergs had been tried and convicted had all occurred before the Atomic Energy Act had been passed, and the Atomic Energy Act not only did not repeal the Espionage Act, but expressly provided that the new act was not to exclude the application of provisions of other laws. This provision, they said, could refer to nothing else than the Espionage Act of 1917.

At 12:30 P.M. on June 19, court reconvened and Chief Justice Vinson formally announced that the order for a stay of execution issued by Justice Douglas had been revoked. Justices Douglas and Black dissented, and Justice Frankfurter, while not formally dissenting, said he thought time should be given for more extended argument and consideration.[24]

When the Supreme Court had re-established the date of execution, defense counsel made a second application to the President for clemency. Without hesitation the Chief Executive denied the plea. His formal pronouncement added little to his rejection of the first appeal:

> No judge has ever expressed any doubt that [the Rosenbergs] committed the most serious act of espionage. . . . I am not unmindful of the fact that this case has aroused grave concern both here and abroad in the minds of serious people, aside from the consideration of the law. In this connection, I can only say that by immeasurably increasing the chances of atomic war the Rosenbergs may have condemned to death tens of millions of innocent people all over the world.

The President conceded that the execution of two human beings was a grave matter. "But even greater," he said, "is the thought of the millions of dead whose death may be directly attributable to what these spies have done."

[24] 346 U. S. 271.

It had been announced that the execution would take place on Friday, June 19. Executions at Sing Sing usually take place at 11:00 P.M., but the hour for the execution of the Rosenbergs was advanced to 8:00 P.M. to avoid carrying out the sentences on the Jewish Sabbath.

The Rosenbergs met death calmly. Agents of the Department of Justice who stood by in hopeful anticipation of a last-minute breakdown and confession were disappointed, for the condemned man and wife protested their innocence to the end. If the atomic spy ring encircled others besides Alan Nunn May, Klaus Fuchs, Harry Gold, Anatoli Yakovlev, David Greenglass and the Rosenbergs, the revelation would have to come from other sources.

Julius and Ethel Rosenberg were the first Americans ever condemned to death for espionage in an American civil court. Mrs. Rosenberg was the first woman in the United States since Mrs. Surratt to suffer death by the decree of a Federal tribunal.

In view of all the agitation for the Rosenbergs while they lived, the reaction to their death was, in the United States, rather mild. In Washington, New York, Boston and San Francisco there were street demonstrations, but they were of no great magnitude and soon either spent themselves or were brought under control. The nation's newspapers approved the President's denial of clemency almost unanimously.

Abroad it was another story. In London thousands jammed the West End streets and called down maledictions on the "bloodthirsty, witch-hunting Americans." With a headline five inches high a *Daily Worker* extra branded the execution MURDER.

In Paris thousands marched through the Champs Elysées and the Place de la Concorde to the heavily guarded American Embassy, shouting "American Murderers" and "Shame America!" The Paris press likened the Rosenberg case to that of Dreyfuss—but without "the triumph of justice" which saved the innocent French captain.

The current issue of *Newsweek* magazine reported it was

an open secret that the United States Embassy at Paris had twice advised the State Deparment that the Rosenbergs' death sentence should be commuted to life imprisonment. The embassy feared that the execution would aid Communists in arousing an overwhelming and general anti-American sentiment throughout France.

One of America's foremost columnists, while not advocating clemency for the Rosenbergs, predicted that if they were executed they would be hailed and exploited by organized communism the world over as martyrs of the barbarous American capitalistic system. The columnist also predicted that while such misrepresentation might possibly deceive some foreigners who were unfamiliar with our institutions, few, if any, loyal Americans would permit themselves to be agitated by the fate of the "atom spies." While both forecasts seem to have been proved accurate, the President's observation in his denial of the second application for executive clemency appears equally true. "The case has aroused grave concern . . . in the minds of serious people" quite aside from a consideration of the trial itself. No one can seriously question the fairness of the trial or of the legal processes which brought the case on eight separate occasions to the bar of the highest court in the land. But there remain some disturbing questions. Was the Espionage Act of 1917 designed to punish equally one who furnishes secret military information to an enemy in arms and one who furnished such information to an ally? And granting that the act makes it a crime to transmit such information to an ally in time of war against a common enemy, does conviction for such an offense justify a sentence of death? Finally, should the death penalty be imposed in any case where substantially all the incriminating evidence comes from confessed accomplices? These are some of the questions which have made and will continue to make the Rosenberg case a *cause célèbre* in American criminal annals.